No. 91-1146

Supreme Court, U.S.
FILED
JAN 13 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

—against—

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. To establish antitrust standing, must a plaintiff separately satisfy both (a) the antitrust injury requirement of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); and (b) the directness requirement of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Associated General Contractors*, *supra*; and *Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990)?

2. Does an antitrust plaintiff satisfy the directness requirement for antitrust standing established under this Court's decisions in *Illinois Brick*, *supra*, *Associated General Contractors*, *supra*, and *Utilicorp*, *supra*, by alleging a "direct effect," even while conceding that before reaching plaintiff the impact of the alleged anticompetitive behavior passed through one or more intervening market levels and one or more intervening economic actors, none of whom are named as co-conspirators?

LIST OF PARTIES

Petitioners Unionamerica Insurance Company Ltd., Continental Reinsurance Corporation (U.K.) Limited, CNA Re (U.K.) Ltd., Kemper Reinsurance London, Ltd., Excess Insurance Company, Ltd., Terra Nova Insurance Company Limited and Ballantyne, McKean & Sullivan Limited are defendants in the District Court in *In re Insurance Antitrust Litigation*, MDL 767 (N.D. Cal.), and were appellees in the Court of Appeals. Respondents, who include plaintiffs and defendants in the District Court and appellants and appellees in the Court of Appeals, are:

Plaintiffs (Appellants in the Court of Appeals):

State plaintiffs:

State of California
Commonwealth of Massachusetts
Commonwealth of Pennsylvania
State of Alabama
State of Alaska
State of Arizona
State of Colorado
State of Connecticut
State of Louisiana
State of Maryland
State of Michigan
State of Minnesota
State of Montana
State of New Jersey
State of New York
State of Ohio
State of Washington
State of West Virginia
State of Wisconsin

Government entity plaintiffs:

Borough of Chambersburg, Pennsylvania
City of Altoona, Pennsylvania

City of Baton Rouge, Louisiana
City of Birmingham, Alabama
City of Clay, West Virginia
City of Eunice, Louisiana
City of Lafayette, California
City of Mobile, Alabama
City of Nachitoches, Louisiana
City of New Orleans, Louisiana
City of San Francisco, California
City of Slidell, Louisiana
City of York, Pennsylvania
County of Cowlitz, Washington
County of Hancock, West Virginia
County of Hardin, Ohio
County of Mineral, West Virginia
County of San Benito, California
County of San Francisco, California
County of Schuylkill, Pennsylvania
County of Teton, Montana
County of Wirt, West Virginia
Roosevelt Island [New York] Operating Authority, Inc.
Town of Hanover, Massachusetts
Town of Milford, Massachusetts
Township of Jackson, Ohio
Village of Lake Success, New York
Village of Groton, New York

Private plaintiffs:

Ace Check Cashing, Inc.
Acme Corrugated Box Company, Inc.
Anastasios Markos, t/a Municipal Exxon
Bay Harbor Park Homeowner's Association, Inc.
Bensalem Township Authority
Big D Building Supply Corporation
Carlisle Day Care Center, Inc.
Carmella M. "Boots" Liberto, t/a R.J. Liberto, Inc.
Durawood, Inc.

Environmental Aviation Sciences, Inc.
Glabman Paramount Furniture Mfg. Co., Inc.
Henry L. Rosenfeld, t/a Mobile Check Cash
Jerry Grant Chemical Associates, Inc.
Keyboard Communications, Inc.
Kirklington Park, Inc.
Les Ray Bobcat, Inc.
P & J Casting Corp.

Defendants (Appellees in the Court of Appeals):

Industry group defendants:

Insurance Services Office, Inc.
Reinsurance Association of America

Primary insurer defendants:

Allstate Insurance Company
Aetna Casualty & Surety Company
CIGNA Corporation
Hartford Fire Insurance Company

Domestic reinsurer defendants:

Constitution Reinsurance Corporation
General Reinsurance Corporation
Mercantile & General Reinsurance Company of America
North American Reinsurance Company
Prudential Reinsurance Company
Winterthur Swiss Insurance Company

Domestic reinsurance broker defendant:

Thomas A. Greene & Company, Inc.

Foreign reinsurer defendants:

C.J.W. (Underwriting Agencies) Limited
D.P. Mann Underwriting Agency Limited
Edwards & Payne (Underwriting Agencies) Limited
Janson Green Management Limited
Lambert Brothers (Underwriting Agencies) Limited

Merrett Underwriting Agency Management Limited
Murray Lawrence & Partners
Sturge Reinsurance Management Ltd.
Peter N. Miller
Robin A.G. Jackson
Three Quays Underwriting Management Limited

Foreign reinsurance broker defendant:

R.K. Carvill & Company

STATEMENT PURSUANT TO RULE 29.1

The petitioners' affiliates for purposes of Rule 29.1 are as follows:

Petitioner Unionamerica Insurance Company Ltd.: The Continental Corporation, The Continental Insurance Company, The Hong Kong Fire Insurance Co. Limited, Continental Insurance Company (Europe) Ltd., Continental Reinsurance Corporation (U.K.) Limited.

Petitioner Continental Reinsurance Corporation (U.K.) Limited: The Continental Corporation, The Continental Insurance Company, The Hong Kong Fire Insurance Co. Limited, Continental Insurance Company (Europe) Ltd., Unionamerica Insurance Company Ltd.

Petitioner CNA Re (U.K.) Ltd.: Loews Corporation, CNA Financial Corporation, Continental Casualty Company, CNA Management Company, Ltd.

Petitioner Excess Insurance Company, Ltd.: ITT Corporation, ITT Hartford Group, Inc., Hartford Fire Insurance Company, Hartford International Insurance Company, London & Edinburgh Insurance Group, Ltd.

Petitioner Kemper Reinsurance London, Ltd.: Kemper Reinsurance Company, Kemper Europe Reassurances, S.A., Kemper Reinsurance Company, Kemper Corporation, Lumberman's Mutual Casualty Company, KREL Services Limited.

Petitioner Terra Nova Insurance Company Limited: Ian Morton Underwriting Agency Ltd.

Petitioner Ballantyne, McKean & Sullivan Limited: None within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners are Unionamerica Insurance Company Ltd. ("Unionamerica"), Continental Reinsurance Corporation (U.K.) Limited ("CRC(U.K.)"), CNA Re (U.K.) Ltd. ("CNA Re (U.K.)"), Excess Insurance Company, Ltd. ("Excess"), Kemper Reinsurance London, Ltd. ("Kemper"), Terra Nova Insurance Company Limited ("Terra Nova") and Ballantyne, McKean & Sullivan Limited ("Ballantyne") (collectively, the "petitioners"). Petitioners seek issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the Court of Appeals' judgment and opinion reversing a judgment of the United States Dis-

trict Court for the Northern District of California. The District Court had dismissed this case as to all defendants.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), and is reproduced in the Appendix at A1-A35.[1] The opinion of the District Court is reported as *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989) (Schwarzer, J.), and is reproduced in the Appendix at A36-A86.

JURISDICTION

The Court of Appeals entered judgment on June 18, 1991, and denied petitioners' petition for rehearing and suggestion for rehearing en banc on October 15, 1991. A87-A99.

This Court has jurisdiction to review the Court of Appeals' judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves sections 4 and 16 of the Clayton Act, 38 Stat. 731, codified (as amended) at 15 U.S.C. §§ 15(a), 26. The text of those statutes is reprinted in full in the Appendix at A100-A102.

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1 The opinion reported at 938 F.2d 919 differs from the panel opinion issued on June 18, 1991. Although the Court of Appeals never issued an order modifying the June 18, 1991 opinion, petitioners assume that the Court of Appeals authorized the changes in the reported opinion. Petitioners therefore rely on the text of the reported opinion in this petition and the accompanying Appendix.

STATEMENT OF THE CASE

A. Statement of the Proceedings Below

These consolidated actions were filed by 19 states and numerous private plaintiffs, all of whom sue as consumers of commercial general liability ("CGL") insurance.[2] Plaintiffs' allegations focus on a series of purported anticompetitive agreements by varying groups of defendants that allegedly had the effect of restricting the terms, conditions and availability of CGL and property coverage. In the claims considered in this petition, plaintiffs allege that certain agreements among participants in the London reinsurance markets as to the types of risks they would reinsure affected decisions by primary insurers as to the types of coverages those primary insurers would offer to consumers. Plaintiffs seek both treble-damage and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for injuries allegedly resulting from the decreased availability of those coverages at the consumer level. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331.

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2 The attorneys general of eight states initiated this action in March 1988, when they filed detailed, multicount complaints (the "California-style" complaints) against 32 entities and individuals engaged in various parts of the insurance business in the United States and London. A18. In June 1988, the attorneys general of ten additional states filed virtually identical complaints (the "Connecticut-style" complaints) against the same defendants, but reconfigured the claims and added a new overarching conspiracy claim. A18. Another state, Louisiana, later joined the case by filing a Connecticut-style complaint; Minnesota, one of the original eight complainants, amended its complaint to conform to the Connecticut style. A18. The states sue on behalf of themselves and classes of state governmental entities, and as *parens patriae* on behalf of their general welfare and economy. The California and Connecticut complaints are reprinted in the Appendix at A103-A154 and A155-A200, respectively.

Between March and May 1988, various private plaintiffs filed numerous additional actions mimicking the California-style complaints on behalf of classes of insurance consumers from around the nation.

On August 30, 1988, the Judicial Panel on Multidistrict Litigation consolidated all the private actions with the states' actions in the Northern District of California before the Honorable William W. Schwarzer. Pursuant to Judge Schwarzer's request for potentially dispositive motions addressed to the pleadings and the undisputed facts, defendants filed five motions, including a motion by the domestic and foreign reinsurers and foreign retrocessional reinsurers to dismiss on the ground that plaintiffs lacked antitrust standing. The standing motion was addressed to all the claims raised in the complaints.

The reinsurers and retrocessional reinsurers argued that plaintiffs were not proper antitrust plaintiffs under sections 4 and 16 of the Clayton Act and this Court's decisions in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), because the plaintiffs did not allege that they participated in the reinsurance and retrocessional reinsurance markets defined by the complaints.

On September 20, 1989, the District Court dismissed plaintiffs' complaints, granting four of defendants' motions, but denied the antitrust standing motion. Relying on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and plaintiffs' allegation that "the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers," the District Court ruled that the complaints alleged "agreements the direct effect of which, if true, would be to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." A67. The court held that plaintiffs therefore had standing. A67.

Plaintiffs appealed. In response, the foreign reinsurers and retrocessional reinsurers argued to the Ninth Circuit that plaintiffs' lack of standing provided an alternative ground for affirming the District Court's judgment as to the three claims in which only those foreign defendants were named. The for-

eign reinsurers and retrocessional reinsurers argued, among other things, that this Court's intervening decision in *Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990), reaffirmed the requirement that an antitrust plaintiff participate in the directly restrained market.

On June 18, 1991, the Court of Appeals reversed the District Court's judgment of dismissal and, among other rulings, rejected the foreign reinsurers' and retrocessional reinsurers' antitrust standing argument. The Court of Appeals determined that "[a]lmost all of the *Associated General Contractors* factors"—which it identified as five—supported plaintiffs' antitrust standing. A21. Balancing those factors without addressing this Court's decisions in *Illinois Brick* or *Utilicorp*, the Court of Appeals ruled that plaintiffs had established antitrust standing. A21.[3]

B. Statement of the Facts[4]

1. The Products and the Markets Involved

CGL insurance, the focus of this case, protects an insured against liability to third parties for bodily injury or property damage and is typically purchased by commercial enterprises, nonprofit entities, and government units. A13; A38; A107 (¶ 4a); A159 (¶ 4a). Property insurance protects an insured

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3 Petitioners understand that other London reinsurers, led by Merrett Underwriting Agency Management Limited, will file a petition seeking a writ of certiorari to review the decision below insofar as it reversed the District Court's dismissal of the complaint on international comity grounds. Pursuant to Rule 12.4 of this Court, petitioners here intend to submit a response supporting that petition.

4 This statement of the pertinent facts is drawn from the allegations of the complaints as characterized by the Court of Appeals and the District Court. Although the Court of Appeals offered a brief summary of the facts, it adopted the District Court's statement of the facts as its own. A13. Because petitioners' standing motion under Fed. R. Civ. P. 12(b)(6) was addressed only to the pleadings, this Court, like the courts below, must accept the allegations of the complaints as true for purposes of this petition. *See Associated General Contractors*, 459 U.S. at 526.

against the risk of damage to property. Consumers of CGL and property insurance purchase their coverage from primary insurers in the primary insurance market. A13; A38-39.

Primary insurers cede to reinsurers a portion of the risks they accept in underwriting CGL and property coverages. A13; A48; A109 (¶ 4o); A161-62 (¶ 4p). In other words, primary insurers purchase insurance—known as reinsurance—from reinsurers in the reinsurance market. A13; A48; A109 (¶ 4o); A161-62 (¶ 4p). The complaints allege that "[t]he terms and availability of reinsurance directly affect the terms and availability of primary insurance." A13; A49.

In yet another market, the retrocessional reinsurance market, reinsurers cede a portion of the risk they assume from primary insurers. A13; A49; A162 (¶ 4r). Hence, retrocessional reinsurance functions as insurance for reinsurers. A13; A49; A162 (¶ 4r). Purchasers of primary insurance do not purchase reinsurance, and only reinsurers purchase retrocessional reinsurance.[5]

2. The Claims Addressed by this Petition

As the foreign reinsurers stressed to the courts below, their standing argument, and hence this petition, is addressed to claims that allege only anticompetitive agreements in the reinsurance and retrocessional reinsurance markets and that name only reinsurers and reinsurance brokers. These are the only claims, other than the dismissed "global conspiracy" charge,[6]

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5 The Court of Appeals identified five insurance markets as the subject of the complaints. A16. The first three—for CGL insurance, excess and umbrella liability insurance, and property insurance—are each primary or direct insurance markets. A14-16. The fourth and fifth markets are the reinsurance and retrocessional reinsurance markets—the only markets in which these petitioners are alleged to have acted. A16; A113 (¶ 17); A167 (¶¶ 28-33).

6 In the District Court, the petitioners were named in a "global conspiracy" claim that charged all 32 defendants in the litigation with a conspiracy to restrict the availability of certain CGL products and cov-

(footnote continued)

in which petitioners are named. The first such claim (the "occurrence reinsurance claim") names petitioner Ballantyne, a London reinsurance broker, together with London reinsurers, and alleges an anticompetitive agreement in the London reinsurance market to refuse to sell primary insurers CGL coverage for risks written on forms incorporating an "occurrence" triggering mechanism.[7]

The second claim addressed by this petition (the "pollution reinsurance claim") charges petitioners Unionamerica, CNA Re (U.K.), Terra Nova and Ballantyne, together with other London reinsurers, with participating in an agreement in the London reinsurance market not to sell primary insurers CGL coverage for sudden and accidental pollution risks.[8]

The third claim addressed by this petition (the "pollution retrocession claim") charges petitioners Unionamerica, CRC(U.K.), Kemper, Excess and Terra Nova, together with

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erages. This claim was dismissed by the District Court for failure to state a claim, and the Court of Appeals affirmed the dismissal.

7 *See* claim five of the California-style complaints, A141-A142; claim three of the Connecticut-style complaints, A190-A192. Plaintiffs claim that certain Lloyd's of London entities and one reinsurance broker agreed to "restrict the terms under which reinsurance coverage would be provided for CGL risks; . . . refuse to reinsure those CGL risks written on an occurrence form; and . . . eliminate reinsurance coverage for 'long-tail' risks covered by occurrence policies." A141 (¶ 133); A191 (¶ 127).

8 *See* claim six of the California-style complaints, A143-A144; claim four of the Connecticut-style complaints, A192-A193. Plaintiffs claim that certain Lloyd's of London entities, three London Company Market firms, and a broker to the London reinsurance market "conduct[ed] meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks . . . [and] agree[d] to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks." A144 (¶ 139); A193 (¶ 133).

other London retrocessional reinsurers, with participating in an agreement in the London retrocessional reinsurance market to limit reinsurance coverage for property pollution risks.[9]

REASONS TO GRANT THE WRIT

The United States Court of Appeals for the Ninth Circuit has diverged fundamentally from both this Court's teaching and the decisions of other courts of appeals as to antitrust standing under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a), 26.

While this Court in *Associated General Contractors* spoke of various "factors" relevant to antitrust standing, 459 U.S. at 537, the Court's antitrust standing cases have identified two separate and independent limitations on the remedial scope of antitrust law: (*i*) the plaintiff must allege antitrust injury—that is, " 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' " *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1889 (1990) (to be reported at 495 U.S. 328) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *accord Cargill*, 479 U.S. at 109-10; *Associated General Contractors*, 459 U.S. at 539-40; and (*ii*) the plaintiff must be among the class of persons *most directly injured* by the alleged anticompetitive conduct, *Utilicorp*, 110 S. Ct. at 2812; *Cargill*, 479 U.S. at 111 n.6; *Associated General Contractors*, 459 U.S. at 541-42; *Blue Shield of Virginia v. McCready*, 457 U.S. at 474-75; *Illinois Brick*, 431 U.S. at 729. These separate and distinct

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9 *See* claim eight of the California-style complaints, A145-A147; claim five of the Connecticut-style complaints, A193-A195. Plaintiffs claim that certain Lloyd's of London entities and London Company Market firms that participate in the London LMX ("London Market Excess") retrocessional reinsurance market agreed to "boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage include[d] a seepage, pollution and contamination exclusion clause." A146 (¶ 149(b)); A194 (¶ 138(b)).

requirements constitute the antitrust standing doctrine. *See Associated General Contractors*, 459 U.S. at 540.

In the decision below, the Ninth Circuit (Noonan, J.) altered these requirements in two critical respects. *First*, the Ninth Circuit blended the antitrust injury and directness requirements and thereby allowed its determination that plaintiffs had adequately pleaded antitrust injury to influence its decision on the distinct question whether plaintiffs were directly injured so as to make them proper parties to seek a remedy for the alleged violation. *Second*, the Court of Appeals held that plaintiffs had satisfied the directness requirement as to their claims against foreign reinsurers and retrocessional reinsurers, from which they did not purchase, by alleging that these defendants' conduct had a "direct effect" on plaintiffs—even though the Court of Appeals and plaintiffs expressly recognized that any such effect reached plaintiffs only after passing through an intervening class of economic actors, the primary insurers. The Court of Appeals thereby redefined the "directness" requirement in a manner that effectively eviscerates it.

This Court has recognized repeatedly the harm that can flow from unpredictable and overly broad application of federal antitrust remedies. Unfortunately, this Court's antitrust standing jurisprudence still has not been correctly applied by the Court of Appeals for the Ninth Circuit and the other courts of appeals that take the same approach. In fact, because current concepts of antitrust standing have developed from two distinct lines of precedent—one focused on the nature of the injury, the other on its directness—unwarranted confusion among the circuits continues. The Court should grant this petition to clarify the application of the two elements of antitrust standing and to bring the Ninth Circuit into line with the decisions of this Court and the majority of the other courts of appeals.

I. This Court Should Grant the Writ to Clarify that Antitrust Injury and Directness Are Independent Requirements of Antitrust Standing

Following established Ninth Circuit precedent, the Court of Appeals identified "the nature of the injury" as one of several factors that would be balanced to determine whether plaintiffs satisfied a unitary requirement of antitrust standing. The Court of Appeals then accorded "tremendous significance" to the anticompetitive nature of the plaintiff-consumers' injury in reaching its conclusion that plaintiffs had standing. By failing to apply the antitrust injury requirement independently of the entirely separate directness requirement, the Ninth Circuit has created a balancing test that permits a plaintiff showing antitrust injury to sue without establishing directness—and, conversely, a directly injured plaintiff to sue without establishing antitrust injury. The Ninth Circuit's formulation departs from both this Court's teaching and the analyses of other courts of appeals, increasing the confusion in an area of the law in which courts and commentators already have called for guidance.

In analyzing whether the plaintiff could sue in *Associated General Contractors*, this Court first determined that the plaintiff had not alleged antitrust injury under *Brunswick*. *Associated General Contractors*, 459 U.S. at 538-40.[10] The Court then proceeded, apparently as an alternative ground for dismissal, to examine the directness of plaintiff's alleged injury, considering the existence of a more directly affected class of potential plaintiffs, the speculative nature of the plaintiff's harm, the risk of duplicative recoveries and the difficulties of apportioning damages. *Id.* at 541-45.

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10 The antitrust injury requirement ensures that the antitrust laws will protect " '*competition*, not *competitors*,' " *Cargill*, 479 U.S. at 110 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)), by limiting the availability of antitrust remedies to plaintiffs whose injuries flow from a lessening of competition, *Brunswick*, 429 U.S. at 489.

"The Court's approach in *Associated General [Contractors]* had bred much confusion in the lower federal courts." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991). As the Eleventh Circuit observed, *Associated General Contractors* leaves unclear whether antitrust injury and directness are two of several factors to consider under a single standing requirement, or two independent elements of standing, *both* of which must be satisfied by an antitrust plaintiff. *Id.*; *see* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1512 (1985) (cited in *Atlantic Richfield*, 110 S. Ct. at 1894, and *Cargill*, 479 U.S. at 110 n.5). Similarly, the Seventh Circuit has stated:

> The issue of antitrust standing has become somewhat confused. Some courts have considered "antitrust injury" as an additional element of standing, while others have considered the two requirements as analytically distinct. The Supreme Court failed to clarify the issue in *Associated General [Contractors]* by incorporating a *Brunswick*-type analysis in its consideration of whether a plaintiff is a proper party.

Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1201 (7th Cir. 1986) (citations omitted). The Fifth Circuit, too, has remarked that "[r]ecent Supreme Court and Fifth Circuit decisions concerning whether a party has antitrust standing have left some confusion as to the role that 'antitrust injury' plays in the standing inquiry." *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988).

The Court's decision in *Cargill* might have eliminated the confusion created by *Associated General Contractors*. There this Court explained, albeit in dictum:

> A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but not be a proper plaintiff under § 4 for other reasons.

479 U.S. at 110 n.5. Those other reasons, the Court continued, were the factors other than antitrust injury considered in *Associated General Contractors* and *Illinois Brick*: "the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed," all of which relate to the directness requirement. *Id.* at 111 n.6.

Two subsequent decisions should have made clear the independence of each of these two elements of antitrust standing. Without considering directness, the *Atlantic Richfield* Court barred a section 4 claim because the plaintiff had not shown antitrust injury. 110 S. Ct. at 1889-95.[11] Without considering antitrust injury, the *Utilicorp* Court barred a section 4 claim because the plaintiffs had not met the directness requirement. 110 S. Ct. at 2811-18.

The Court's decisions in *Cargill*, *Atlantic Richfield* and *Utilicorp* have led some courts of appeals to recognize the independence of antitrust injury and directness. In *Todorov v. DCH Healthcare Auth.*, for example, after noting the confusion surrounding antitrust standing, the Eleventh Circuit properly adopted a two-step analysis:

> First, a court should determine whether the plaintiff suffered "antitrust injury"; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury.

921 F.2d at 1449. A majority of the other courts of appeals appear to agree with this approach.[12]

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11 Even with respect to *Atlantic Richfield*, one commentator has remarked that a "tangential . . . sidebar" in that opinion "needlessly conflates antitrust injury with the broader notion of antitrust standing and suggests that the Court has not totally distinguished the two doctrines." *The Supreme Court, 1989 Term: Leading Cases*, 104 Harv. L. Rev. 319, 326 (1990).

12 *See, e.g., Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 26-28 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 66

(*footnote continued*)

In stark contrast with *Todorov v. DCH Healthcare Auth.* and similar decisions in other circuits, the Ninth Circuit routinely treats antitrust injury and directness as factors to be balanced in a single antitrust standing test.[13] It appears that the Fourth and Fifth circuits have taken the same approach.[14]

The Ninth Circuit's analysis in this case illustrates the degree to which its approach inappropriately alters the directness inquiry. The Court of Appeals listed as the "fifth factor" in its standing inquiry "The Nature of the Plaintiffs' Claimed Injury." A20. It then reasoned:

(2d Cir. 1988); *National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 912 (2d Cir. 1988); *Alberta Gas Chems. Ltd. v. E.I. duPont de Nemours & Co.*, 826 F.2d 1235, 1240 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988); *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988); *Axis, S.p.A. v. Micafil, Inc.*, 870 F.2d 1105, 1108-09 (6th Cir.), *cert. denied*, 493 U.S. 823 (1989); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d at 1201; *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1377 (7th Cir. 1987); *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 449-50 & n.6 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); *Todorov v. DCH Healthcare Auth.*, 921 F.2d at 1449; *Municipal Utils. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1499-1500 (11th Cir. 1991).

The First and Federal Circuits apparently have not addressed the point. The Tenth Circuit has decided one case that potentially raises the issue, but the decision was ambiguous. *See Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 960-62 & n.15 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1990).

13 *See, e.g., R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540, 543 (9th Cir. 1987); *Lucas v. Bechtel Corp.*, 800 F.2d 839, 844-45 (9th Cir. 1986); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985).

14 *See, e.g., Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219-20 (4th Cir. 1987); *Bell v. Dow Chem. Co.*, 847 F.2d at 1182-83.

> [P]laintiffs here were consumers of CGL insurance. As consumers, they participated in the market said to have been restrained. The antitrust laws are intended to preserve competition. They are intended to preserve competition for the benefit of consumers in the market in which competition occurs. When competition is choked off, it is the consumers who suffer. The plaintiffs here as consumers have alleged antitrust injury.

A21. In other words, the Ninth Circuit determined, incorrectly as to the claims before it, that (a) plaintiffs had alleged a restraint in the primary insurance market, in which they participated as consumers, and (b) such restraint could create antitrust injury.

Whether the plaintiffs suffered antitrust injury is irrelevant to the London reinsurers' standing motion. Their motion did not raise the *Brunswick* antitrust injury issue and did not address claims naming primary insurers or alleging anticompetitive agreements in primary insurance markets. Instead, the motion raised a pure *directness* challenge based on plaintiffs' concession that they did not participate in the reinsurance and retrocessional reinsurance markets in which the conspiracies allegedly occurred. The Court of Appeals' determination that the plaintiffs' supposed antitrust injury contributed to their standing in this case ignored the only features of those alleged agreements relevant to the defendants' directness challenge: that the alleged agreements occurred only in remote markets and that any anticompetitive effect on the plaintiffs was filtered through either primary insurers or, in the case of the pollution retrocession claim, *both* reinsurers and primary insurers.

Compounding its error, the Court of Appeals followed Ninth Circuit precedent by giving "tremendous" weight to the existence of antitrust injury in the balance of factors by which it determines antitrust standing. A20. This practice compromises the independence of the separate antitrust injury and directness requirements. Indeed, it would permit the Ninth Circuit to circumvent the directness requirement

altogether by allowing adequately pleaded antitrust injury alone to outweigh any degree of indirectness. The danger of the Ninth Circuit's approach is well illustrated by its decision here, where it conferred standing even while recognizing that any injury that reached these indirect purchaser plaintiffs did so only "through the primary insurers," A20-21, thereby all but eliminating the directness requirement. *See* Part II, *infra*.

This Court should grant the writ to resolve the inconsistent approaches of the courts of appeals and to confirm that the antitrust injury and directness requirements are separate and independent elements of antitrust standing.

II. This Court Should Grant the Writ to Correct the Ninth Circuit's Redefinition of the Directness Requirement of *Illinois Brick*, *Associated General Contractors* and *Utilicorp*

This Court has repeatedly held that consumers who "are not the immediate buyers from the alleged antitrust violators" are not proper parties to sue for damages under section 4 of the Clayton Act. *Utilicorp*, 110 S. Ct. at 2812; *see Illinois Brick*, 431 U.S. at 729 ("overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [section 4]"). This directness requirement bars a section 4 claim by a purchaser whose alleged injury was "only an indirect result of whatever harm may have been suffered" by other entities in other markets. *Associated General Contractors*, 459 U.S. at 541.

The directness requirement ensures the most efficient and effective enforcement of the antitrust laws by obviating the complexities and inefficiencies that would arise if indirectly affected plaintiffs—here, indirect "purchasers" of reinsurance and retrocessional reinsurance—could prosecute an antitrust claim based on alleged violations directly affecting other parties in other markets. In cases under both sections 4 and 16 of the Clayton Act, the directness requirement ensures that only the party most motivated to pursue a competitively efficient remedy—the party actually involved in the market

in which the competitive restraint is alleged—will be the plaintiff. *Utilicorp*, 110 S. Ct. at 2815-16; *Illinois Brick*, 431 U.S. at 745-46; *see also* Page, 37 Stan. L. Rev. at 1445 n.1. In damages cases, the directness rule serves also to minimize problems of complex apportionment and the risk of duplicative recovery. *See Utilicorp*, 110 S. Ct. at 2813, 2815; *Associated General Contractors*, 459 U.S. at 544-45; Page, 37 Stan. L. Rev. at 1484.

Sacrificing each of the goals of the directness requirement, the Court of Appeals here allowed plaintiffs to bring claims against reinsurers and retrocessional reinsurers from whom they admittedly were *not* direct purchasers—and who sold "products" (reinsurance and retrocessional reinsurance) that plaintiffs could not buy. A21. According to the Court of Appeals:

> As the district court found, [the plaintiffs alleged that] "the direct effect" of the reinsurers' action was "to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, [A67]. That the action of the reinsurers *took effect through* the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct. The injury alleged was direct.

A20 (emphasis added). Thus, although it understood the complaints to allege that the reinsurers' anticompetitive conduct in the reinsurance and retrocessional reinsurance markets "took effect through the primary insurers," the Court of Appeals held that plaintiffs had satisfied the directness requirement simply by pleading that remote defendants' conduct in remote markets had the "direct effect" of restraining the availability of coverage in the primary insurance markets in which plaintiffs participated.[15]

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15 The Ninth Circuit's reformulation of the directness requirement is also reflected in its inquiry into the existence of an identifiable class of persons who had been more directly affected by the alleged violation. (*footnote continued*)

The Ninth Circuit's reformulation of the directness standard flouts the teaching of *Illinois Brick*, *Associated General Contractors* and *Utilicorp*. In *Utilicorp*, for example, this Court held that a regulated public utility's customers could not sue the utility's suppliers for allegedly conspiring to inflate the price of gas sold to the utility, even though the plaintiffs alleged that the utility had passed on its own costs to its customers. A clearer allegation of "direct effect" is difficult to imagine, but this Court nevertheless ruled that the consumer plaintiffs had not satisfied the directness requirement of section 4 in their litigation against the suppliers. 110 S. Ct. at 2810. *See also Illinois Brick*, 431 U.S. at 726. The Ninth Circuit's determination that a naked allegation of "direct effect" on consumer plaintiffs satisfies the directness requirement also conflicts with the consistent holdings of the other courts of appeals. *See, e.g., Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) ("availability of the section 4 remedy depends not on the plaintiff's characterization of the illegal activity but on whether the problems identified in *Illinois Brick* would be avoided if relief were allowed").[16]

See Associated General Contractors, 459 U.S. at 541-42; *Utilicorp*, 110 S. Ct. at 2816. The Court of Appeals recognized that the "primary insurers who were denied reinsurance could have brought suit." A20. However, instead of concluding that this readily identifiable, more directly affected class of potential plaintiffs precluded the consumer plaintiffs from meeting the directness requirement, the Court of Appeals reasoned that "[t]he theoretical possibility that such entities could have sued must be discounted by the power the allegations attribute to the London reinsurers," to which it found the primary insurers, but not the consumer plaintiffs, subject. A20. In this manner, the Court of Appeals again allowed a conclusory allegation by plaintiffs to override the concrete determinants that this Court has set forth.

16 *See also Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991) (plaintiff denied standing where plaintiff's injury from defendant's alleged anticompetitive conduct was "discernible but indirect"); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 931 (3d Cir. 1986) (denying standing "[b]ecause appellants did not purchase directly from [defendant]").

The dangers posed by the Ninth Circuit's reformulation of the directness requirement are reflected in its treatment of the considerations this Court has said are particularly relevant to damages actions—*i.e.*, whether, because of indirectness, the assessment of damages would require complex apportionment and create a risk of duplicative recoveries. *See Associated General Contractors*, 459 U.S. at 543-44; *accord Utilicorp*, 110 S. Ct. at 2815; *Illinois Brick*, 431 U.S. at 731-32. The Court of Appeals first acknowledged that plaintiffs would need to present "complex" proof to show that they had paid more for primary insurance because of the alleged restraints in the reinsurance and retrocessional reinsurance markets. It nevertheless concluded, without explanation, that "it would appear that they could prove how much extra they had to pay." A20.

The Court of Appeals then conceded that "[i]n the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery." A20. As a result, the Court of Appeals correctly concluded that, as to the three claims addressed by this petition, "the character of the damages is against standing." A20. Inexplicably, rather than dismissing those claims, the Court of Appeals balanced the apportionment problems it had identified in the foreign reinsurer-only claims against the joint and several liability it assumed would govern the claims in which primary insurers were also named, concluding that "the net balance as to damages is in favor of standing." A20.[17] Quite apart from the unwarranted balancing of distinct claims, the Court of Appeals' discussion highlights the certain effect of its reform-

17 The Court of Appeals made no attempt to explain the propriety of denying a motion to dismiss one claim on the ground that a wholly separate claim against *other* defendants purportedly remedied its insufficiency. The Court of Appeals' reasoning is especially curious in light of its affirmance of the District Court's dismissal of the global conspiracy claim, the only claim to which its theory of the London reinsurers' joint and several liability with the other defendants, including the primary insurers and domestic reinsurers, might have applied. A30.

ulated directness requirement: to create the complex apportionment and duplicative recovery problems that the directness requirement is designed to avoid.

Finally, the Ninth Circuit's willingness to grant these plaintiffs standing in reliance on *Associated General Contractors* without addressing *Utilicorp* or *Illinois Brick* erroneously suggests that the directness requirement of the latter cases differs from that of *Associated General Contractors*.[18] This Court should grant the writ in order to bring the Ninth Circuit into alignment with this Court and the other courts of appeals, as well as to confirm that *Associated General Contractors*, *Utilicorp* and *Illinois Brick* reflect the same principle of directness.

III. The Court of Appeals' Error Threatens to Expand Antitrust Standing and to Create the Inefficiencies this Court Has Sought to Avoid

The Ninth Circuit's approach to antitrust standing undermines that doctrine in two ways. First, the Ninth Circuit has allowed the presence of antitrust injury to offset the absence of directness, a requirement that must be met independently. Second, the Ninth Circuit has expansively redefined the directness requirement to permit the mere pleading of "direct effect" to overcome evident indirectness.

The Ninth Circuit's reformulation is of far more than academic concern. This Court has recognized that any rule that allows indirect-purchaser actions will require "additional long and complicated proceedings involving massive evidence and complicated theories," *Hanover Shoe, Inc. v. United Shoe*

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18 In earlier cases, this Court had suggested a distinction between the indirect purchaser rule of *Illinois Brick* and the requirements of antitrust standing. *See Blue Shield of Virginia v. McCready*, 457 U.S. at 476; *Illinois Brick*, 431 U.S. at 728 n.7. However, by incorporating the rationale of *Illinois Brick* into its discussion of antitrust standing in *Associated General Contractors*, 459 U.S. at 544-45, the Court demonstrated that the rule of *Illinois Brick*, and now *Utilicorp*, represents but one application of a more comprehensive requirement of directness. *See* Page, 37 Stan. L. Rev. at 1486-88.

Machinery Corp., 392 U.S. 481, 493 (1968), about "what the direct purchaser might have done" had the antitrust violation not occurred, *Utilicorp*, 110 S. Ct. at 2813-14; *accord Associated General Contractors*, 459 U.S. at 544-45; *Illinois Brick*, 431 U.S. at 737-41. These difficulties "would normally prove insurmountable." *Hanover Shoe*, 392 U.S. at 493.

Conversely, in the absence of massive actions joining and apportioning all potential claims, there arises the prospect of multiple treble-damage recoveries, with the attendant possibility that antitrust violators will be subjected to ruinous damage awards far in excess of their illegally earned profits. *See Utilicorp*, 110 S. Ct. at 2815; *Associated General Contractors*, 459 U.S. at 543-44; *Illinois Brick*, 431 U.S. at 730-31 & n.11. This threat would chill efficient competitive behavior because of increased fear among economic actors of ruinous antitrust liability. *See* Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 447 (1985).[19]

The threat posed by the Ninth Circuit's approach is well illustrated by the future prospects of this case, which involves an effort both to reach foreign entities with whom plaintiffs do not deal and to restructure foreign markets in which plaintiffs do not participate. The allegedly restrained London reinsurance market is only one of several sources available to primary insurers seeking reinsurance coverage, A116 (¶ 30), and reinsurance typically covers only a portion of the primary insurer's total underwriting risks, A71-72. Hence, to establish their damages claim, plaintiffs would have to reconstruct—and inevitably speculate about—innumerable decisions by other actors (including individual retrocessionnaires, reinsurers, primary insurers and insureds) concerning

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19 Another consequence of expanded antitrust standing would be a growth in strike suits designed to coerce a favorable monetary settlement or to alter competitive behavior. *See Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *see also* Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & Econ. 405, 433-35 (1985); Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 Duke L.J. 1353, 1366-72 (1978).

to what extent and on what terms they would have obtained coverage absent the alleged violations. The massive proof, sophisticated statistical and economic analyses, and sheer speculation that will be required to litigate these indirect purchaser claims present precisely the problems this Court has instructed the federal courts to avoid.

In short, the approach adopted by the Ninth Circuit here promotes inefficient and random private enforcement of the antitrust laws, *Illinois Brick*, 431 U.S. at 745 ("combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement"); *accord Utilicorp*, 110 S. Ct. at 2815-17 (same), and intolerable burdens on the judicial system, *Blue Shield of Virginia v. McCready*, 457 U.S. at 475 n.11 ("the task of disentangling overlapping damages claims is not lightly to be imposed upon potential litigants, or upon the judicial system"). If the directness requirement is to serve its purpose—to create an effective and efficient antitrust enforcement mechanism that does not simultaneously produce costly social and legal externalities—the standard established by the Ninth Circuit cannot be allowed to stand. This Court should exercise its supervisory powers to review that Court's decision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit to review the Court of Appeals' judgment and opinion.

Respectfully submitted,

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January 13, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: INSURANCE ANTITRUST LITIGATION

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a Municipal Exxon; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, et al., Private Plaintiffs,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al.,

Defendants-Appellees.

No. 89-16405

D.C. No. CV-88-1688-WWS

OPINION

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al.,

Defendants-Appellees.

No. 89-16513

D.C. No. CV-88-0981-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

v.

INSURANCE SERVICES OFFICE, INC., CNA RE (U.K.) Ltd.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE Ltd.; EXCESS INSURANCE CO., Ltd.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, INC.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

No. 89-16513

D.C. No.
CV-88-0981-WWS

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.

Defendants-Appellees.

No. 89-16514

D.C. No. CV-88-0983-WWS

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.

Defendants-Appellees.

No. 89-16515

D.C. No. CV-88-0984-WWS

STATE OF MINNESOTA,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.

Defendants-Appellees.

No. 89-16516

D.C. No. CV-88-0985-WWS

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.

Defendants-Appellees.

No. 89-16517

D.C. No. CV-88-0986-WWS

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.
Defendants-Appellees.

No. 89-16518

D.C. No.
CV-88-0987-WWS

CITY OF MOBILE; STATE OF ALABAMA; CITY OF BIRMINGHAM,
Plaintiffs-Appellants,

v.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

No. 89-16519

D.C. No.
CV-88-0988-WWS

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16520

D.C. No.
CV-88-1009-WWS

STATE OF MARYLAND,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16521

D.C. No.
CV-88-2327-WWS

STATE OF WASHINGTON; COUNTY OF COWLITZ,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16522

D.C. No. CV-88-2328-WWS

STATE OF NEW JERSEY,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16523

D.C. No. CV-88-2329-WWS

STATE OF COLORADO,
Plaintiff-Appellant,

v.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

No. 89-16524
D.C. No. CV-88-2330-WWS

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16525
D.C. No. CV-88-2331-WWS

STATE OF CONNECTICUT,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16526

D.C. No.
CV-88-2332-WWS

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16527

D.C. No.
CV-88-2333-WWS

STATE OF ALASKA, *Plaintiff-Appellant*, v. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16528 D.C. No. CV-88-2334-WWS
STATE OF MONTANA; COUNTY OF TETON, *Plaintiffs-Appellants*, v. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16529 D.C. No. CV-88-2335-WWS

STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16530
D.C. No.
CV-88-2341-WWS

STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES and EUNICE,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16531
D.C. No.
CV-88-1131-WWS

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
March 15, 1991—San Francisco, California

[Reported at 938 F.2d 919
1991-1 Trade Cases ¶ 69,460]
Filed June 18, 1991.
[Rehearing Denied October 15, 1991]

Before BEEZER and NOONAN, Circuit Judges,
and SINGLETON,* District Judge.

NOONAN, Circuit Judge:

Nineteen states and numerous private parties brought antitrust suits against the defendants named above. These suits were consolidated in the district court and were ultimately dismissed. The plaintiffs appeal. We reverse the district court and remand.

FACTUAL BACKGROUND

The undisputed facts are set out by the district court in *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 468-70 (N.D. Cal. 1989). We summarize:

Commercial general liability insurance (CGL) protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit entities, and governmental units. Defendants Hartford Fire Insurance Company (Hartford), Allstate Insurance Company (Allstate), Aetna Casualty and Surety Company (Aetna), and CIGNA Corporation (CIGNA) are sellers of CGL.

In distinction from these primary insurers, there are reinsurers to whom the primary insurers turn to share their risk. The terms and availability of reinsurance directly affect the terms and availability of primary insurance. In turn, retrocessional insurance—insurance for reinsurers—has an impact on the terms of reinsurance and primary insurance. The defendant reinsurers in this case are domestic—*e.g.*, General Reinsurance Corporation (General Re)—and also foreign. The foreign defendant companies include one Swiss corporation, Winterthur Swiss Insurance Company (Winterthur); and six "London Company Market" corporations, all of them subsidiaries of American corporations: Terra Nova Insurance

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

Co., Ltd. (Terra Nova); Unionamerica Insurance Co., Ltd. (Unionamerica); Continental Reinsurance Co., (U.K.) Ltd. (Continental Re); Excess Insurance Group, Ltd. (Excess); Kemper Reinsurance London, Ltd. (Kemper Re); and CNA Re (U.K.) Ltd.

Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London. A variety of defendants here are underwriters for these reinsurance syndicates—*e.g.*, Merrett Underwriting Agencies Management, Ltd. (Merrett) and Three Quays Underwriting Management Ltd. (Three Quays). Thomas A. Greene and Co., Inc. (Greene) is an American reinsurance broker, a defendant here. Ballantyne, McKean and Sullivan, Ltd. (Ballantyne) and R.K. Carvill & Co., Ltd., (Carvill) are London reinsurance brokers, defendants here. There are also individual defendants associated with reinsurance—*e.g.*, Peter North Miller, the chairman of the Council of Lloyd's, its governing body; and Robin A.G. Jackson, chief underwriter for Merrett.

Two insurance associations are also defendants. One is Reinsurance Association of America (RAA), which principally engages in lobbying. The other is the Insurance Service Office (ISO). ISO has a key role in the regulation of insurance by the several states. Formed in 1971 by the merger of eleven insurance rating bureaus, ISO is an association of over fourteen hundred property and casualty insurers. It develops standard forms of policies. It collects statistical data and estimates risks relevant to the forms. In those states where regulators formally approve the forms, ISO presents the forms for approval.

In 1984, Hartford expressed its dissatisfaction with the standard ISO form for CGL insurance. In particular, Hartford was displeased with the way the form insured against "occurrences" of liability during the life of the policy. Such insurance had "a long tail," *i.e.*, years after the policy had expired, a claim might be made upon it for an occurrence during the life of the policy. Hartford wanted a "claims made" form to replace the "occurrences" form. Under a "claims made" form only claims made during the life of the

policy would be paid. Hartford also objected to coverage of liability for accidental pollution in the standard CGL form.

Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form. ISO began to retreat. In September 1984 ISO agreed to the unprecedented presence of domestic and foreign reinsurers at its executive committee meeting of September 20, 1984. Four reinsurance underwriters from Lloyd's conveyed their insistence on Hartford's terms. Change the form or get no reinsurance was their theme. ISO responded by eliminating accidental pollution coverage and by approving a claims made form with a date after which claims could not be filed. ISO also continued to offer a CGL occurrence form.

The reinsurance defendants continued to press for elimination of the occurrence form. They announced, publicly and privately, that there would be no reinsurance for primary insurers writing on the occurrence form, and they refused to renew long-standing reinsurance treaties with primary insurers in the United States unless they agreed to abandon the occurrence form. As a result of the reinsurers' actions, primary insurers were precluded from selling long tail insurance and also from selling accidental pollution insurance. Whether these varieties of insurance disappeared entirely is not clear; what is alleged is that their availability was substantially diminished. In most states where a regulatory state agency approved insurance forms, ISO obtained approval of its new CGL form. Thereafter, ISO withdrew its data collection and risk-estimation support for the pre-1984 form.

In late 1985 Hartford and Aetna took the lead in urging ISO to develop standard forms for two other types of CGL insurance: umbrella and excess. With the cooperation of Mer-

rett, Three Quays and Allstate, these standard forms were prepared and approved by ISO.

London reinsurers including Unionamerica, Terra Nova, Excess, Kemper Re and Continental Re, plus the Lloyd's underwriters Merrett and Edwards and Payne agreed to boycott reinsurance and insurance policies for United States property seepage and pollution exposures. The agreement is memorialized in the "Non Marine London Market Agreement 1987," signed by over forty retrocessional reinsurers at Lloyd's and the London Company Market. The parties to the agreement agreed to accept retrocessional reinsurance only from reinsurers who signed a letter of intent stating the following:

> We hereby agree that we will use our best endeavours to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution exclusion clause wherever legal and applicable.

The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution.

The Markets

As the plaintiffs have presented their case, the markets affected by the defendants' conduct are (1) the market in the United States for CGL insurance, (2) the market in the United States for excess and umbrella CGL insurance, (3) the market in the United States for property insurance, (4) the market in the United States and the United Kingdom for reinsurance, and (5) the market in the United Kingdom for retrocessional insurance.

The Suits

The complaint filed by California is representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. In its first claim, Cali-

fornia alleges that the American reinsurer defendants; the four primary insurer defendants; Winterthur; and Greene conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to restrict the terms on which reinsurance would be offered for CGL risks and to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms. In its second claim, California alleges that named Lloyd's underwriters; the four primary insurer defendants; and the brokers Greene and Carvill conspired to the same effect. In the third claim, California alleges that the Lloyd's underwriters; the four primary insurers; the American reinsurers; Winterthur; and Greene and Carvill conspired to the same effect.

In its fourth claim, California includes as defendants RAA and ISO together with the primary insurers; the Lloyd's underwriters; the American reinsurers; Winterthur; and Greene and Carvill. California charges them with conspiracy to eliminate pollution coverage and retroactive coverage from the 1984 claims-made form of ISO.

California's fifth claim is against five named Lloyd's underwriters; against Peter Miller and Robin A.G. Jackson; and against the London reinsurance broker Ballantyne, charging them with violation of section 1 of the Sherman Act by conspiracy to restrict the terms on which reinsurance would be provided for CGL risks; to refuse to reinsure CGL risks written on an occurrence form; and to eliminate reinsurance on long-tail risk covered by occurrence policies.

The sixth claim for relief names the Lloyd's underwriters; London company reinsurers, Unionamerica, Terra Nova, and CNA Re; and London reinsurance broker Ballantyne as conspirators to violate the Sherman Act by restricting the terms on which CGL reinsurance would be provided and by limiting the availability in the United States of pollution coverage.

In the seventh claim California charges ISO; Aetna, Allstate and Hartford; and the underwriters Merrett and Three Quays with violating the Sherman Act by agreeing to, and promulgating, model forms for umbrella and excess insurance.

The eighth claim of California is that the six named London Company reinsurers plus Merrett conspired to restrict the terms on which property insurance and reinsurance coverage would be provided for North American risks.

The ninth to eleventh claims of California are for violations of state law—of, respectively, the Cartwright Act, California Business and Professional Code, § 16720 et seq.; the Unfair Trade Practices Act, California Insurance Code, § 790 et seq.; and the Unfair Competition Act, California Business and Professions Code § 17200 et seq. No defendants are named in these claims but it is asserted that all of the conspiracies federally charged violated the three state laws invoked here.

The complaint of Connecticut is representative of complaints filed after the California complaint by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. There is substantial overlap between the California and Connecticut complaints. Connecticut, however, in its first claim charges all of the defendants with violation of section 1 of the Sherman Act "by a conspiracy with the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance in connection therewith."

PROCEEDINGS

In March 1988 eight plaintiff states filed California-style complaints. In June 1988 ten additional states filed Connecticut-style complaints. Louisiana later joined this group, and Minnesota amended its complaint to conform to the Connecticut style. Various private plaintiffs joined in; all but two—from Illinois and Florida—were from states that were already plaintiffs.

The defendants filed five motions asking the district court to dismiss the suits for failure to state a cause of action or, in the alternative, to grant summary judgment. On October 10, 1989 the district court gave judgment for the defendants for

reasons that will be taken up *infra*. Doing so, the district court treated its action as dismissal for failure to state a cause of action or, in the alternative, as summary judgment for the defendants. The district court accepted all the facts alleged by the plaintiffs and stated that there were "no factual disputes material to this ruling." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 491.

Thereafter the plaintiffs moved to amend, and the district court denied the motion, observing: "The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law." *Id.* at 490.

The plaintiffs appeal.

ANALYSIS

Standing

The domestic and foreign reinsurers challenged the plaintiffs' standing to bring an antitrust suit against them. The district court ruled in the plaintiffs' favor. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 482-83. The foreign reinsurer defendants press their position on this appeal.

Standing in the sense challenged depends on whether Congress in the Sherman Act intended to protect the kind of interest asserted by the plaintiffs. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989). To answer this question we look at the five factors set out in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 723 (1983).

First: The Specific Intent of the Alleged Conspirators. The reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs. This factor favors standing.

Second: The Directness of the Injury. "Directness" in the antitrust context means "close in the chain of causation." *R.C. Dick*, 890 F.2d at 147. Accepting as we must the plaintiffs' allegations as true, there is a close connection between the conduct of the reinsurer defendants, domestic and for-

eign, and the damages suffered by the plaintiffs. As the district court found, "the direct effect" of the reinsurers' action was "to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 483. That the action of the reinsurers took effect through the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct. The injury alleged was direct. This factor favors standing.

Third: The Character of the Damages. According to their claims, plaintiffs suffered by having to pay more for the insurance they wanted. Although the proof may be complex, it would appear that they could prove how much extra they had to pay. In the claims in which the primary insurers are charged together with the reinsurers, all of the defendants would be jointly and severally liable if the charges are true. In the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery. To the extent of this problem and this damage, the character of the damages is against standing; but the net balance as to damages is in favor of standing.

Fourth: The Existence of Other, More Appropriate Plaintiffs. The primary insurers who were denied reinsurance could have brought suit. The theoretical possibility that such entities could have sued must be discounted by the power the allegations attribute to the London reinsurers. The 1400 members of ISO could not withstand this power. As they caved in to it, they are unlikely to desire to challenge it in court. Consumers of insurance are not subject to this restraint. Realistically, no more appropriate class of plaintiffs exists.

Fifth: The Nature of the Plaintiffs' Claimed Injury. The fifth factor is "of tremendous significance." R.C. Dick, 890 F.2d at 148, quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 n. 3 (9th Cir. 1985). For example, a plaintiff who is "neither a competitor nor a consumer" in the relevant market does not suffer "antitrust injury." *R.C. Dick* at 148.

In contrast, plaintiffs here were consumers of CGL insurance. As consumers, they participated in the market said to have been restrained. The antitrust laws are intended to preserve competition. They are intended to preserve competition for the benefit of consumers in the market in which competition occurs. When competition is choked off, it is the consumers who suffer. The plaintiffs here as consumers have alleged antitrust injury.

The Balance. Almost all of the *Associated General Contractors* factors point to the presence of standing against all of the defendants. By not challenging the plaintiffs' standing on this appeal, the defendant primary insurers and the domestic reinsurers concede the presence of the factors that establish standing. The foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers. As the district court determined, the plaintiffs have standing to maintain this antitrust suit against all defendants.

Standing as Parens Patriae

That a state as *parens patriae* may sue to redress a violation of the antitrust laws is well-established. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-51, 65 S.Ct. 716, 722-23, 89 L.Ed. 1051 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.") There must, of course, be antitrust injury for an injunction to be granted. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-16, 107 S.Ct. 484, 488-92, 93 L.Ed.2d 427 (1986). Each state here asserts its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 3269, 73 L.Ed.2d 995 (1982). That interest makes each state "more than a nominal party." *Id.* The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction. *Id.* at 605, 102 S.Ct. at 3268.

The McCarran-Ferguson Act Defense

The district court dismissed the claims of the plaintiffs because of the McCarran-Ferguson Act immunity of the defendants. We look at the plaintiffs' allegations, accepting them as the district court did as true, to see if McCarran immunity is present.

The McCarran-Ferguson Act provides that no act of Congress "shall be construed to invalidate" any state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (1988). Two relevant exceptions are added: The Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.* Moreover, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

For the immunity to apply, therefore, the defendants must be in the business of insurance; that business must be regulated by state law; and the defendants must not have agreed to boycott, coerce, or intimidate or performed an act of boycott, coercion or intimidation.

The Business of Insurance

The district court correctly found that the first condition was met: the defendants are in the business of insurance. Reinsurance and retrocessional insurance are as much the business of insurance as the offering of primary insurance. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 473. Although the plaintiffs made an issue of this question in the district court, they do not seriously argue it on this appeal.

State Regulation

Do the states regulate the conduct complained of here? The district court observed that the complaints filed by the states alleged violation of state law as well as violation of the Sherman Act. The district court concluded that these allegations were "self-defeating." *Id.* at 475. The states had wounded

their case mortally by asserting that the defendants were liable to state regulation.

By the same token, it could be observed, the defendants by their McCarran-Ferguson Act defense conceded that their business was subject to regulation by the states, and the foreign defendants thereby undermined their claim that comity barred their being subject to American regulation. The district court recognized that the position of the foreign defendants was inconsistent but did not feel bound to resolve the inconsistency, treating the defendants' pleas as alternatives: they won either because they were subject to state regulation or, because of comity, they were subject to no American regulation. *Id.* at 479.

What is sauce for the goose is sauce for the gander. If defendants are to be read as offering inconsistent alternatives, so are the plaintiffs to be read. Pleading of one alternative does not destroy the foundation of the other alternative. Neither side is trapped by its pleadings.

More fundamentally, established law blocks regulation by one state of the United States of the insurance business outside the borders of that state. A state's regulation of insurance does not have extraterritorial effect within the United States. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99, 302, 80 S.Ct. 717, 720-21, 722, 4 L.Ed.2d 724 (1960). The court commented on the legislative history of the McCarran-Ferguson Act and concluded from H.R. Rep. 143, 79 Cong. 1st Sess. 3, which cited *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; and *Connecticut General Insurance Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 that a state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state. *Id.* 362 U.S. at 300-01, 80 S.Ct. at 721-22. The Court summed up the legislative history: "There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300, 80 S.Ct. at 721.

A fortiori, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states. J. Atwood & K. Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) 1, 78. All of the arguments eloquently put by the London defendants in their objection to the application of the Sherman Act to their business apply fifty times over to the regulation of it by the individual states. State insurance schemes "do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* Consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants. By the same token, the claims by the states against the foreign defendants alone under state insurance laws (referencing the fifth, sixth, and eighth California claims) must be dismissed as seeking to exercise extraterritorial jurisdiction.

A different question is presented by the primary insurers, the American reinsurers, and the American insurance brokers, all of whom are subject to regulation by the states and therefore prima facie immune. The question is whether the action of these domestic defendants in combination with the foreign defendants is subject to state regulation. The states argue that it is not. They invoke the principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979). Membership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable. *Beltz Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1366-67 (9th Cir. 1980). The domestic defendants offer no rebuttal to these authorities. We conclude that the domestic defendants' immunity was lost when they conspired with the foreign defendants.

Boycotts

A second, independent ground exists why the McCarran-Ferguson Act defense does not work for any of the defendants. The Sherman Act applies to persons or companies in the insurance business if they agreed to a boycott or engaged

in acts of boycott or coercion. The allegations of the plaintiffs, here accepted as true, charge agreements by the defendants to boycott nonconforming insurers and acts of boycott and coercion. No immunity for such agreements and acts exists.

The defendants' position is that they could confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable. But they are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks. The facts underlying these allegations are asserted in some detail, including, the actions of Hartford, CIGNA, Aetna, and Allstate in 1984 in bringing pressure on the ISO staff and other ISO members; the meeting of March 2, 1984 between representatives of Hartford and representatives of General Re when they agreed to coerce ISO to accept their demand; the successful effort of General Re with RAA so that on March 26, 1984, RAA created a committee, consisting of five of the defendant domestic reinsurers, to force revision of the ISO forms of CGL insurance; the agreement of this committee on June 15, 1984 to boycott the 1984 forms, followed by a letter from RAA to ISO on June 19, 1984, stating that the members of RAA would not provide reinsurance for coverages written on the 1984 forms; the enlistment of Thomas Greene to carry this message to ISO, as he did in a speech to the ISO directors on June 21, 1984.

Hartford, Aetna, CIGNA, and Allstate—all according to allegations that here are accepted as the truth—also took the initiative to encourage a boycott of the 1984 ISO forms by the lead underwriters of North American casualty reinsurance at Lloyd's of London and used Thomas Greene and Nick Graham of Carvill to carry the message to the London reinsurance market. As a result of these efforts, the lead underwriters, named as defendants here, met representatives of

ISO at the Garrick Club in London on July 4, 1984 and indicated their resolve to eliminate the occurrence form. On September 19, 1984, at a dinner at the Board Room, a private club in New York City, a combination of representatives of the defendant domestic reinsurers and foreign underwriters communicated to ISO members their agreed demands for change. The following day ISO largely capitulated. Agreements to boycott and acts of implementation of the agreements are, in short, explicitly set forth in the complaints.

In the classic case on boycotts in the context of the McCarran-Ferguson Act, *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978), four insurance companies entered into an agreement according to whose terms three of the companies would not sell insurance to doctors in order to force them to accept "new ground rules of coverage set by the fourth." *Id.* at 533, 98 S.Ct. at 2926. The Court found "an organized boycott" to exist, stating: "The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-45, 98 S.Ct. at 2931. That is exactly what Hartford and the other defendant prime insurers did here, always accepting the plaintiffs' allegations as true: they enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. The London reinsurers did similarly in denying retrocessional coverage on policies covering pollution risks.

Congress, the Court said in *St. Paul*, intended to guard against "the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." *Id.* at 547, 98 S.Ct. at 2933. The states allege that Hartford and its allies engaged in precisely such conduct and that the reinsurers did the same among themselves.

The Court in *St. Paul* gave prominence to the explanation of the McCarran-Ferguson Act by Senator O'Mahoney, who said the vice in the insurance industry was "a system of pri-

vate government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 548, 98 S.Ct. at 2933. That is precisely what has happened in this case, according to the plaintiffs: the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered.

The district court, of course, was as familiar with *St. Paul* as this court is, but placed an emphasis that we do not on the Court's statement that the boycotting insurers there would not deal with the doctors "*on any terms.*" The district court supplied italics for this phrase which is unemphasized in the Court's opinion. Compare *In re Insurance Antitrust Litigation*, 723 F. Supp. at 476, with *St. Paul*, 438 U.S. at 552, 98 S.Ct. at 2935. The issue before the Court was whether "boycott" in the McCarran-Ferguson Act meant boycotts directed against policyholders as well as boycotts directed at competitors. *Id.* at 552, 98 S.Ct. at 2935. The Court held the term to include both kinds of boycott. The description of the boycott at issue was not made as a definition excluding from the definition refusals to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms. So the three malpractice insurers in *St. Paul* used their economic power to force doctors to accept St. Paul's terms; so here, the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted. They, if plaintiffs are correct in their allegations, engaged in a boycott.

The district court limited the term "boycott" in a second way, quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984): "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott. . . ." But this dictum is taken from its context. In *Feinstein* an agree-

ment between a county medical association and an insurance agent led the defendant insurer to provide malpractice insurance only to members of the association. The plaintiff doctors could buy insurance from other insurers and did not contend that they were subject to a boycott; what they objected to was the "inherently coercive" power of the defendants' "monopoly power." *Id.* at 933. We observed that the plaintiffs' objection to monopoly power was an invocation of section 2 of the Sherman Act, and by its terms the McCarran-Ferguson Act gave immunity from this part of the Sherman Act. *Id.* at 933-34. *Feinstein* is patently very different from the case where boycotts are alleged by plaintiffs who say that the defendants conspired to restrict primary insurance by the reinsurers' agreement to a boycott.

Why were the charges of the complaint not as plain to the district court as they appear to be on appeal? Because the district court took the position that the insurers' and reinsurers' agreement on terms was immune and that such agreement "comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 478. But when "the economic exigencies" are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented. The defendants are charged with boycotts, and the allegations, taken as true, destroy their McCarran-Ferguson Act immunity.

Excess and Umbrella Insurance. No boycotts are alleged as the defendants' modus operandi in respect to these branches of insurance. The states say that they are parts of the insurance business unregulated by the states and so not immune under McCarran. The district court held to the contrary, finding that all of the relevant states had statutes "broad enough to apply to any persons in the business of insurance." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 474.

The domestic sellers of excess and umbrella insurance were, as the district court held, exempt. But they engaged in agreements—so it is stated—with the non-exempt Lloyd's

underwriters, Merrett and Three Quays. Their own exemption was lost by acting in concert with non-exempt parties. *Group Life and Health Ins. Co.*, 440 U.S. at 231, 99 S.Ct. at 1083.

The State Action Defense

If the states have no regulatory authority over the foreign entities and if combination with the latter forfeits the immunity of the domestic companies, a third line of argument advanced by some defendants works even less well for them. These defendants, referring to those states whose regulatory agencies approved the revised ISO form, contend that there was not only state regulation but state action, and that therefore they have immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The relevant states, they argue, had a clearly articulated policy to displace competition with regulation when they permitted "the collective development" of insurance policy forms and actively supervised the contents of the forms. The action by the states, they assert, insulates them under *Parker* entirely apart from their *McCarran* exemption.

Their argument fails because nothing in the affidavit evidence submitted by the defendants shows that the relevant states supervised or approved the boycotts used to produce agreement on the forms. The plaintiffs, the defendants object, produced no evidence countering their evidence. The plaintiffs did not need to do so: the defendants had made no showing of state action endorsing the boycotts.

The defendants are in the same position as the defendants in *St. Paul*: policy changes desired by St. Paul were assumed by the court to have been filed with the state insurance director. The Court observed that there was no suggestion that Rhode Island, "in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *St. Paul* 438 U.S. at 554 n. 26, 98 S.Ct. at 2936 n. 26. We have adopted the same distinction: state approval of one activity is not state approval of a related but distinct activity. *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988). The alleged

anticompetitive conduct in the present case, as in *Medic Air Corp.*, was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state. *Id.* at 1189. The agreements to refuse to reinsure were not state action.

The Connecticut Claim of a General Conspiracy. The London reinsurers challenged the claim in the Connecticut complaint that included both casualty and property insurance and the reinsurance and retrocessional insurance connected therewith. The district court observed that property insurance had not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. The district court thereupon granted the motion to dismiss this claim. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 484.

The district court rightly objected to a defect in this claim. The plaintiffs moved to amend. The district court denied the motion. The defendants say the motion was too late. But the district court did not deny amendment because the plaintiffs moved too late. It denied amendment because the plaintiffs' entire theory "will not stand under the law." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 490. We are free to review this legal conclusion de novo. It is not consistent with this opinion. The plaintiffs' basic theory is maintainable. On remand of the case to the district court, the plaintiffs should be afforded the opportunity to amend.

Comity

A statute enacted in 1982 declares that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (the FTAIA). But the statute immediately adds, "unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations. . . ." *Id.* The defendants contended in the district court that the FTAIA barred the plaintiffs because the conduct complained of in the London reinsurance claims related to commerce that was "wholly foreign commerce." The district court rejected

this argument, holding as follows: "The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 486. By finding "the effects" sufficient to preclude application of the statute, the district court implicitly found that their impact on the commerce of the United States met the statutory standard of being "direct, substantial and reasonably foreseeable."

On appeal, the London reinsurers devote a single sentence in a single footnote to restating their view that the FTAIA bars the claims directed at conduct within the London reinsurance market. These defendants offer neither evidence nor authority to provide a basis for overturning the district court's holding. We reaffirm its conclusion that the FTAIA is no bar to any of the plaintiffs' claims.

The district court, however, found that international comity forbade its exercise of its jurisdiction over the British defendants. The district court acknowledged that as to this issue its application of the FTAIA might be argued to be decisive. *Id.* at 486, n. 28. But there were no court decisions so holding. The House Report on this legislation stated that it had "no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 *U.S. Code Cong. & Admin. News* at 2431, 2498. The district court prudently concluded that it should apply the analysis of comity set out in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*).

On appeal, the plaintiffs renew their argument: the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, is dispositive. The defendants do not reply to their argument but by implication of their insistence on *Timberlane* do not concede. We strike a middle position. We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the

exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

Timberlane I was an opinion of this court written by Judge Herbert Choy which "has commanded a wide following." Atwood & Brewster, *Antitrust and American Business Abroad* 1, 162-63. As an advance upon Judge Learned Hand's exposition of the law of extraterritorial application of American antitrust law in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), *Timberlane* was "a major development." Atwood & Brewster, 1, 163. Rejecting the simple test of the effect of the charged conduct upon American commerce, *Timberlane* adopted "a jurisdictional rule of reason." *Timberlane I*, 549 F.2d at 613. We were to "weigh" and to "balance" the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved. We now conduct this examination and evaluation in terms of the factors enumerated by *Timberlane*.

First: The Degree of Conflict With Foreign Law or Policy. The government of the United Kingdom has filed a brief as amicus on this appeal. That brief informs us that the Lloyd's Acts 1871-1982 provide detailed regulation of the Society of Lloyd's. The regulation is supplemented by the Insurance Companies Act of 1982, which applies to most insurance companies as well. The Restrictive Trade Practice (Services) Order exempts certain insurance services from the Restrictive Trade Practices Act of 1976. See *In re Insurance Antitrust Litigation*, 723 F. Supp. at 488. The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." *Id.* at 489. The British brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

Second: The Nationality or Allegiance of the Parties and the Locations or Principal Places of Business of the Corporations. All of the plaintiffs are located in the United States. There is a substantial American interest in hearing their case. That interest is increased because nineteen of the plaintiffs are themselves states of the United States. The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 489. The interests of Britain are at least diminished where the parties are subsidiaries of American corporations. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as coconspirators with American insurers. As to these counts, the interest of an American court in being able to judge claims against an American company is high. It would not make much sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

Third: The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance. It would be unrealistic to expect a British court to enforce an American court's injunction against Lloyd's. It would not be unrealistic to expect an American court to be able to obtain compliance with its orders by the subsidiary of an American parent and to be able to affect the way the foreign defendants conducted themselves in the United States. Damages, if awarded, could be collected from assets of the foreign defendants within the United States. The decree of an American court setting out the obligations of the American insurers would undoubtedly be effective and surely would have an impact on the way the American insurers did business with the foreign defendants.

Substantial compliance, in short, could be achieved. This factor is in favor of the exercise of jurisdiction.

Fourth: The Relative Significance of Effects on the United States as Compared With Those Elsewhere. The comparison led to the ultimate dismissal of the Timberlane suit in *Timberlane II*: the effects of the conduct charged were substantial in Honduras and minimal in the United States. *Timberlane II*, 749 F.2d at 1385. The case here is just the reverse. The effects are minimal, or at any rate not large in England, and they are, as implicitly found by the district court, "direct, substantial, and reasonably foreseeable" in the United States, as to which Lloyd's does at least half of its casualty underwriting. Accepting as true the plaintiffs' allegations, the actions of the foreign defendants have had the kind of "real economic consequences" for the American economy that strongly weigh in favor of the exercise of jurisdiction. *See* Atwood and Brewster, 1, 169.

Fifth: The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce. The purpose of the agreements to boycott was to affect the insurance business in the United States. The district court thought that the purpose was "the legitimate business purpose" of reducing the defendants' exposure to certain kinds of risks. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 490. Both purposes existed. But in applying the jurisdictional test it is the purpose to affect American commerce that is more important. The compliance of the charged conduct with the law of the foreign jurisdiction has already been taken into account under the first factor. The fifth factor depends on the relation of the conduct to the United States: was it intended to have effects here? The answer in this case must be yes. So the complaints charge. The fifth factor strongly weighs in favor of the exercise of jurisdiction.

Sixth: The Foreseeability of the Effects on American Commerce. The district court concluded that the defendants conceded that the effects were foreseeable. *Id.* As intended, the effects were, of course, foreseeable. As they were substantial, their foreseeability becomes a strong factor favoring the exercise of jurisdiction.

The Balance. A single factor points toward abstention: the conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance. Every other factor—nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction. Unless we were to create a kind of analogue of the McCarran-Ferguson Act for insurance business regulated by a foreign country and treat Lloyd's as immune, the district court should exercise jurisdiction. No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it. Nothing overcomes the weight of the findings already made under the Foreign Trade Antitrust Improvements Act. The comity factors of *Timberlane* indicate that the court's jurisdiction of the subject matter that exists must be exercised.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re INSURANCE ANTITRUST LITIGATION	MDL No. 767

REVISED MEMORANDUM OF DECISION AND ORDER

October 10, 1989

[Reported at 723 F. Supp. 464
1989-2 Trade Cases ¶ 68,879]

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SCHWARZER, *District Judge.*

I. *INTRODUCTION*

Nineteen states and numerous private plaintiffs have brought actions against a group of insurance companies, reinsurance companies, underwriters, brokers, and individuals, and the Insurance Services Office, Inc. ("ISO"), charging them with violations of the federal antitrust laws and state laws.[1] The charges rest on alleged conspiracies, boycotts, threats, intimidation, and other coercive conduct by defendants to restrict the availability of certain coverage under policies for commercial general liability insurance ("CGL") and property insurance. The filing of these complaints followed lengthy investigations conducted by the regulatory agencies of several states.[2]

Defendants have moved to dismiss, for judgment on the pleadings, and for summary judgment, and plaintiffs have made cross-motions. For purposes of these motions, the well-pleaded allegations of the complaints are accepted as true, and any factual disputes and inferences are resolved in plaintiffs' favor.

Copies of the Court's proposed ruling were distributed to counsel well in advance of the hearing, and the Court has considered the arguments of counsel in reaching the decision reflected in this memorandum.

II. *FACTUAL BACKGROUND*

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, non-profit groups, and governmental entities. Defendants Hartford Fire Insurance Company ("Hartford"), Allstate Insurance Company ("Allstate"), Aetna Casualty and Surety Company

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1 For a list of the parties and of the actions encompassed by this ruling, see Appendix.

2 Moreover, under the Court's pretrial order, the parties were free to conduct discovery insofar as necessary for these motions.

("Aetna"), and CIGNA Corporation ("CIGNA") are primary insurers who are major providers of CGL insurance.[3] CGL insurance is written predominantly on standard policy forms developed by ISO.

ISO is an association of more than one thousand property or casualty insurers, including Hartford, Allstate, Aetna, and CIGNA. It is licensed as a rating, rate service, and advisory organization in all fifty states. One of its primary functions is to develop standardized policy forms for property and casualty insurance that comply with state regulations and will be accepted by state insurance departments. On behalf of its members, ISO files standardized policy forms with state insurance departments. ISO also collects historical loss data, projects future loss trends, and calculates advisory rates for insurance.

In the late 1970s, ISO began to develop a revision of the standard CGL form then in use. In 1984, ISO filed or lodged with state insurance departments two proposed new policy forms for CGL insurance. These forms substantially modified coverage previously available to the insured. One of the forms was a "claims-made" policy under which coverage was limited to claims made during the policy period regardless of when the occurrence out of which the claim arose had taken place. This represented a reduction in the coverage available under the previous CGL policy form which was an "occurrence-based" form; under that form, the insured was covered for claims arising out of occurrences during the policy period, no matter when asserted, thus exposing insurers to so-called "long tail risks" that could arise long after the policy period. The proposed claims-made form reduced that exposure and shifted the risk of future claims to the insured. The other proposed form was a modified occurrence policy.

These forms became the subject of widespread debate and controversy in the insurance industry. Considerable differences of opinion arose over what should trigger coverage, whether retroactivity of claims-made coverage should be lim-

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3 CIGNA is a holding company having subsidiaries which are primary insurers.

ited, whether the pollution exclusion should be modified, and whether defense costs should be limited by the policy limits.

In their complaint, plaintiffs charge defendants Hartford, CIGNA, Allstate, and Aetna with engaging in a concerted effort to block adoption of the 1984 forms because those forms did not restrict coverage sufficiently. Plaintiffs allege that these defendants entered into conspiracies with certain domestic and foreign defendant reinsurance companies, underwriters, and their representatives to "boycott" the 1984 forms unless a retroactive date was added to the claims-made form and a pollution exclusion and defense cost cap were added to both forms. Plaintiffs allege that as a result of the efforts of Hartford, Allstate, Aetna, and CIGNA, certain domestic and London reinsurers threatened to "boycott" North American CGL risks unless these changes were made in the claims-made form and the occurrence form was eliminated. Also as a result of these efforts, the ISO executive committee in September 1984 voted to include a retroactive cut-off date in the claims-made policy form, to exclude pollution coverage from both forms, but to defer until later limiting defense costs, and to offer an occurrence form along with the new claims-made form.

Following this agreement, ISO, Hartford, Aetna, and representatives of the London reinsurers undertook joint efforts to promote the new forms. Reinsurers refused to accept new reinsurance business or renew old business unless the primary carrier agreed to switch to the claims-made form when available. Reinsurers also imposed "sunset dates" in their treaties limiting their exposure to losses on occurrence policies. Reinsurance underwriters also entered into an agreement to exclude pollution liability coverage from reinsurance treaties.

During the period from 1984 through 1986, when these events are alleged to have occurred, ISO lodged or filed the proposed forms with the insurance departments of all states. Departments in thirty-five states held public hearings and the policy terms that are the subjects of the complaints were discussed within the industry and in public forums. As a result ISO filed or lodged several revisions of its proposed forms with the state insurance departments. At the conclusion of

the various states' proceedings in 1986, all of the plaintiff states and the two non-plaintiff states in which individual plaintiffs reside had approved the ISO forms with the following exceptions: Massachusetts and New Jersey disapproved them, New York approved only the occurrence form, and California and Colorado, having no procedure for approval, took no action. Thereafter ISO withdrew its data collection and risk estimation support for the pre-1984 CGL form.

In 1986, ISO and certain defendants agreed that ISO should also develop standard CGL umbrella and excess policy language. In June 1986 ISO released policy language providing for a retroactive date on claims-made policies, a pollution exclusion, and defense costs within policy limits.

Finally, in 1987 domestic and London retrocessional reinsurers[4] are alleged to have entered into an agreement regarding property insurance to use their "best endeavors to ensure that all U.S.A. and Canadian exposed [property] insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

III. *THE FEDERAL LAW VIOLATIONS CHARGED*

The state complaints fall into two groups depending on when they were filed. The First Wave Complaints each contain eight federal claims.[5] The Second Wave Complaints each contain six federal claims.[6] All complaints also contain pendent state law claims. The private complaints track the state complaints.

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4 Retrocessional insurance is insurance for reinsurers.

5 First Wave Complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to First Wave Complaints are to the California complaint.

6 Second Wave Complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to Second Wave Complaints are to the Connecticut complaint.

The First Claim of the Second Wave Complaints alleges a global conspiracy by all defendants in violation of Section One of the Sherman Act, 15 U.S.C. § 1,

> for the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance, . . . to . . . reduce financial exposure to such risks and to increase underwriting profits therefrom.

(Conn. Compl't ¶ 117.) Plaintiffs allege that defendants used boycotts, coercion, and intimidation to limit available coverage. (*Id.* ¶ 118(a).) No corresponding claim is made in the First Wave Complaints.

The Second Claim of the Second Wave Complaints and the First through Fourth Claims of the First Wave Complaints allege a conspiracy by defendants Hartford, Allstate, Aetna, CIGNA, ISO, and certain others[7] to manipulate the ISO design process for CGL forms to limit the available coverage.

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7 The defendants named in these claims are as follows:

The Second Claim of the Second Wave Complaints alleges that defendants Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Green, Edwards & Payne, C.J.W., Thomas A. Greene, R.K. Carvill, RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, and Winterthur Swiss and other co-conspirators were involved. Louisiana also names INA.

The First Claim of the First Wave Complaints alleges concerted action by domestic defendants and also names RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss, and Thomas A. Greene.

The Second Claim of the First Wave Complaints alleges concerted action by foreign defendants and also names Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C.J.W., J. Brian Hose, R.K. Carvill, and Thomas A. Greene. New York and Wisconsin do not name J. Brian Hose; Arizona does not name Robin A.G. Jackson.

The Third Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and names the same defendants as in the First and Second Claims except for C.J.W. and J. Brian Hose.

The Fourth Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and ISO and names the same defendants as in the Third Claim.

Plaintiffs allege that defendants conspired to restrict the terms under which reinsurance coverage would be provided for CGL risks, to refuse to provide reinsurance unless the 1984 form were amended to incorporate defendants' terms, to coerce ISO and its members to adopt the coverage terms and exclusions agreed to by defendants, and to boycott the forms unless amended. (Conn. Compl't ¶¶ 122-123; Cal. Compl't ¶¶ 113-114, 118-119, 123-124, 128-129.)

The Third Claim of the Second Wave Complaints and the Fifth Claim of the First Wave Complaints in substance charge certain defendants[8] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to reinsure CGL risks on occurrence forms by coercion and intimidation of primary insurers, among other things. (Conn. Compl't ¶¶ 127-128; Cal. Compl't ¶¶ 133-134.)

The Fourth Claim of the Second Wave Complaints and the Sixth Claim of the First Wave Complaints in substance charge certain defendants[9] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks and to limit the availability of pollution coverage in primary casualty insurance. No boycott, coercion, or intimidation is alleged. (Conn. Compl't ¶¶ 132-133; Cal. Compl't ¶¶ 138-139.)

The Fifth Claim of the Second Wave Complaints and the Eighth Claim of the First Wave Complaints in substance charge certain defendants[10] engaged in the reinsurance busi-

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8 Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, and Ballantyne McKean. Arizona does not name Peter N. Miller or Robin A.G. Jackson.

9 Merrett Syndicate, Murray Lawrence, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, Oxford, CNA Re, and Ballantyne McKean. Wisconsin does not name CNA Re and does name Robin A.G. Jackson.

10 Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, and Continental Re. Oxford is named only in all the Second Wave Complaints except Alaska's. Wisconsin also names CNA Re.

ness at Lloyd's of London with a conspiracy to restrict the terms on which property insurance and reinsurance coverage would be provided and to limit its availability by, among other things, agreeing to boycott the provision of retrocessional insurance unless the primary insurance excluded seepage, pollution, and contamination coverage. (Conn. Compl't ¶¶ 137-138; Cal. Compl't ¶¶ 148-149.)

The Sixth Claim of the Second Wave Complaints and the Seventh Claim of the First Wave Complaints charge ISO, Allstate, Hartford, Aetna, and certain other defendants[11] with a conspiracy to restrict terms and conditions under which umbrella and excess insurance would be available. No boycott, coercion, or intimidation is charged. (Conn. Compl't ¶¶ 142-143; Cal. Compl't ¶¶ 143-144.)

IV. *THE MOTIONS BEFORE THE COURT*

Defendants have filed five motions to dismiss or for summary judgment on the following grounds:

A. Asserting antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the McCarran Act"), all defendants have moved under Federal Rules of Civil Procedure 12(b)(6) and 56 to dismiss or for summary judgment.

B. Asserting the state action immunity doctrine, all defendants have moved under Rule 56 for summary judgment against all plaintiffs except California, Alaska, Colorado, and Montana on (a) the so-called global conspiracy claim of the Second Wave complaints, and (b) the policy form development claims.

C. Asserting lack of standing, all defendants except ISO, INA, Hartford, Allstate, Aetna, and CIGNA have moved under Rule 12(b)(6) for dismissal of all claims against them. (This motion does not encompass the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.)

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11 Merrett Syndicate and Three Quays. CIGNA is named only in the Second Wave Complaints. Louisiana also names INA.

D. Asserting that there is "no factual allegation linking [them] in a 'global' conspiracy," foreign reinsurer-defendants have moved under Rule 12(b)(6) to dismiss the global conspiracy claim of the Second Wave complaints.

E. Asserting lack of subject matter jurisdiction and international comity, foreign reinsurer and retrocessional reinsurer defendants and one broker have moved under Rule 12(b)(1) to dismiss the two claims alleging conspiracies to eliminate pollution coverage.

The States have moved to strike the defense based on the state action immunity doctrine.

V. *DISCUSSION*

A. *THE McCARRAN-FERGUSON ACT DEFENSE*

Defendants have moved for summary judgment on all federal claims on the ground that their conduct is immunized from antitrust liability by the McCarran Act. Although the primary thrust of the motion is said to be directed at those claims which are based on policy form development activities, the controlling principles apply to defendants' underwriting-related actions as well.[12] Stripped of their pejorative allegations, those claims charge a conspiracy to reduce the exposure of defendant insurers and reinsurers under CGL policies. The defendants sought to accomplish their objective by bringing about changes in standard policy language and by avoiding underwriting or reinsuring risks written on disfavored policy terms. All of this they did in large part by collective action, and it may be assumed that plaintiffs could prove a consequent lessening of competition among defendants and a diminution of options available in the market for CGL insurance, resulting in a restraint of trade.

In the absence of the McCarran Act, those allegations may well state a claim for relief under the Sherman Act. The issue

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12 Those defendants who are named in claims asserting conspiracies in connection with the reinsurance markets have also moved to dismiss on other grounds. They join in this motion as an alternate ground for dismissal. See infra § V.C.

raised by these motions is whether plaintiffs could prove a set of facts under those general allegations that would entitle them to relief notwithstanding the McCarran Act.

That Act states:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .: Provided, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

Section 1013(b) of the Act further provides:

> Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The McCarran Act created limited antitrust immunity for the business of insurance following the Supreme Court's departure, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), from prior holdings that insurance is not a transaction in interstate commerce. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39, 98 S.Ct. 2923, 2928-29, 57 L.Ed.2d 932 (1978). It was passed in response to widespread concern that the states should not be precluded from continuing to regulate and tax the insurance industry. It immunizes the business of insurance from the antitrust laws but only to the extent that it is regulated by the states and does not involve boycott, coercion, or intimidation. *See Feinstein v. Nettleship Co.*, 714 F.2d 928, 931 (9th Cir.1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984). Like all antitrust immunities, it must, of course, be

narrowly construed. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979).

The application of the McCarran Act immunity involves a three step analysis:

(1) Whether the conduct is within the scope of the business of insurance;

(2) Whether that business is regulated by the states; and

(3) Whether the conduct involves boycott, coercion, or intimidation.

(1) *The Business of Insurance*

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court stated the criteria for what constitutes the business of insurance for purposes of the McCarran Act as follows:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

458 U.S. at 129, 102 S.Ct. at 3009.

And in *Group Life & Health Insurance Co. v. Royal Drug Co.*, the Court said:

> References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or

> manufacturer may control cost factors." 440 U.S. at 220-21, 99 S.Ct. at 1078 (citation omitted).

Plaintiffs do not dispute that the activities of defendants insofar as they relate to the terms and conditions of primary, excess, or umbrella insurance, are the business of insurance within the meaning of the McCarran Act. (*See* Plaintiff States' Unified Opposition Brief ("Unified Opp.") 37-40.) They contend, however, that reinsurance is not the business of insurance because it relates only indirectly to the spreading of the policyholder's risk and because, they contend, it is not an integral part of the policy relationship between the insurer and the insured. (*Id.*)

There is no authority for excluding reinsurance from the business of insurance. On the contrary, reinsurance was specifically referred to as a part of the business of insurance in the legislative history of the McCarran Act. *See* 90 Cong. Rec. A4406 (1944); 89 Cong. Rec. 6528 (1943). The Ninth Circuit applied the McCarran exemption to reinsurers as well as to the primary insurer in *Feinstein*. 714 F.2d at 930.

Plaintiffs urge an unreasonably narrow application of the *Pireno* test. Their own description establishes that reinsurance is an integral and vital part of the business of insurance. The complaints define reinsurance as "insurance for insurers." (*E.g.*, Conn. Compl't ¶ 4(p); Cal. Compl't ¶ 4(o).) They go on to describe reinsurance as

> a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(Conn. Compl't ¶ 4(p); *see also* Cal. Compl't ¶¶ 26-29, 34.)

Thus, reinsurance is no less a part of the process of underwriting and spreading risks than primary insurance. Plaintiffs' allegations rest, moreover, on the premise that the terms on which reinsurance is available affect the terms on which primary insurance is written and that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. (Unified Opp. 13-16.) As plaintiffs' brief puts it, "by conspiracy to eliminate reinsurance for the consumer-demanded coverages, the reinsurers acted anticompetitively in reinsurance markets . . . [which] led inexorably to an injury to the States in the interrelated primary insurance markets." (*Id.* at 76.) Because reinsurance is thus an element of the policy relationship with the insured, it is part of the business of insurance. *See also SEC v. National Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1960) (business of insurance includes "activities of insurance companies [that] relate . . . closely to their status as reliable insurers").

By the same logic, retrocessional insurance, which is "insurance for reinsurers" (Conn. Compl't ¶ 4(r)), is part of the business of insurance.[13]

(2) *Regulation by the States*

The condition of state regulation is satisfied by "a state regulatory scheme possess[ing] jurisdiction over the challenged practice." *Feinstein*, 714 F.2d at 933. "It is not necessary to point to a state statute which gives express approval to a particular practice." *Id.*; *see Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1287 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Dexter v. Equitable Life Assur. Soc.*, 527 F.2d 233, 236 (2d Cir. 1975); *Lawyers Title Co. of Mo. v. St. Paul Title Ins. Co.*, 526 F.2d 795, 797-98 (8th Cir. 1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d

13 The argument that the exemption is lost as a result of joint action with non-exempt entities is without merit. *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n. 12 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

1178, 1181-84 (6th Cir. 1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972); *see also* P. Areeda & H. Hovenkamp, Antitrust Law ¶ 210.1b (Supp. 1988) (McCarran immunity distinguished from *Parker v. Brown* immunity; the former requiring only the existence of a state regulatory scheme, without regard to the intensity of state regulation).

This case involves the insurance business in twenty-one states.[14] The Ninth Circuit has held that California's scheme of regulation satisfies the McCarran Act. *Addrisi v. Equitable Assur. Soc. of the United States*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975). The Court takes judicial notice of the laws of the other jurisdictions.[15] Each state has an insurance department with jurisdiction over policy forms. Sixteen of the plaintiff states and the two nonplaintiff states in which private plaintiffs reside require filing and review of policy forms, including umbrella and excess policies offered by admitted insurers. All of the states have licensed ISO and permit joint action by ISO and insurance companies with respect to policy forms. All of the states have unfair insurance trade practice statutes enabling them to proceed against conduct such as that alleged in the complaints. Although plaintiffs contend that reinsurance and umbrella and excess insurance are not regulated by the states, these statutes are broad enough to apply to any persons in the business of insurance, including reinsurers.[16] These statutory schemes are

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14 The nineteen plaintiff states plus Florida and Illinois, the two nonplaintiff states in which private plaintiffs reside.

15 See Defendants' State-by-State Appendix accompanying their McCarran Act motion. The facts set forth in this paragraph have not been disputed in plaintiffs' opposition brief.

16 Cal. Insur. Code § 790.01 is typical:

> This article applies to reciprocal and interinsurance exchanges, Lloyds insurers, fraternal benefit societies, fraternal fire insurers, grants and annuities societies, insurers holding certificates of exemptions, motor clubs, nonprofit hospital associations, agents, brokers, solicitors, surplus line brokers and special lines surplus line brokers as well as *all other persons engaged in the business of insurance.*

(Emphasis added.)

sufficient to qualify under section 1012(b) of the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969) (state laws protecting or regulating, directly or indirectly, relationship between insurer and policy holder qualify); *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958) (state unfair insurance advertising laws qualify); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) (state unfair insurance practice laws that provide for administrative supervision and enforcement qualify).

Plaintiffs' argument that the regulatory schemes of the states do not reach the allegations of subversion of ISO's decision-making process and concerted activity to restrict the availability of coverages in the market is self-defeating. To avoid McCarran Act immunity, plaintiffs rely on allegations of boycott, coercion, and intimidation, and contend that this conduct is prohibited by the states. That prohibition is indeed contained in the unfair practice acts of each state, but the fact that it is satisfies the regulation prerequisite to immunity under section 1012.[17] *See In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1558-60 (8th Cir.), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989).

Plaintiffs' argument that the standards for state action immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), should apply to the McCarran Act lacks any support. As Professors Areeda and Hovenkamp point out, if the regulatory requirements under McCarran "were to coalesce with the *Parker* requirements, the scope of the McCarran-Ferguson Act would be largely irrelevant as a practical matter." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b, at 97 (Supp. 1988). (*See infra* § V.B(1).) Such an interpretation would tend to nullify Congressional intent in adopting the McCarran Act.

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17 Cal. Insur. Code § 790.03(c) is typical:

> Entering into any agreement to commit, or by any concrete action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(3) *The Exclusion of Boycott, Coercion, and Intimidation*

The States have submitted a Statement of Material Facts in support of their unified opposition brief. (Unified Opp. 6-16.) The following facts are material to this section of the opinion.

Twenty of the defendants, including primary insurers, reinsurers, brokers, and underwriters, dissatisfied with the CGL forms approved by ISO in 1984 because those forms failed to eliminate occurrence and pollution coverage, "agreed to and undertook a course of concerted action" to limit the availability of certain CGL coverages, and twelve other defendants ultimately joined in. (*Id.* at 10-11.) This course of action included the following activities. To coerce ISO into revising its 1984 CGL forms, defendant reinsurers agreed to and did announce that reinsurance would not be provided for coverage written on the 1984 form. (*Id.* at 11.) In addition, certain defendants took "coercive action" by agreeing to announce and announcing that they would not provide reinsurance on occurrence policies and would impose sunset clauses in their coverage.[18] (*Id.* at 12.) Certain defendants took "coercive action" by agreeing to include and including a pollution exclusion in their reinsurance treaties. (*Id.* at 13-14.) Certain defendants made a "coercive statement of intention not to provide reinsurance unless the primary policy excludes all property pollution coverage." (*Id.* at 14-15.) Finally, certain defendants agreed to eliminate the same coverage from excess and umbrella policy forms. (*Id.* at 15-16.) And ISO withdrew statistical support for its 1973 form. (*Id.* at 12.)

It will be noted that plaintiffs' statement does not allege a boycott. Nor does it (or the complaints) describe conduct that "accords with the common understanding of a boycott." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 552, 98 S.Ct. 2923, 2935, 57 L.Ed.2d 932 (1978). As the Supreme Court described the conduct there in issue,

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18 A "sunset clause" limits the reinsurer's liability to those claims presented to it by the primary insurer prior to a specified date.

> The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four *would not deal on any terms with the policyholders* of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, *to refuse to sell any insurance to its policyholders.* "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action."
>
> The agreement binding petitioners *erected a barrier between St. Paul's customers and any alternative source* of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. *This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage,* as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.

Id. at 552-53, 98 S.Ct. at 2935-36 (citation omitted) (emphasis added).

In contrast, plaintiffs here charge no more than an agreement to restrict coverage. But they seek to piggyback this charge on conclusory allegations of pressure and compulsion that echo *Barry*. The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders on any terms. As the Court said:

> Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. *This agreement did not simply fix rates or terms of coverage;* it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical

> weapon invoked by St. Paul in support of a dispute with its policyholders. *The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.*

Id. at 544-45, 98 S.Ct. at 2931 (emphasis added).

Thus, the issue is not whether defendants used pressure to reduce the coverage available to buyers of insurance. The issue is whether they entered into concerted refusals to deal that denied consumers access to the markets for the desired coverages. The Ninth Circuit explained the meaning of boycott in *Feinstein*: "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiff to purchase the defendants' insurance." 714 F.2d at 933.

The distinction between lawful joint action and prohibited boycott and coercion is also explained in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C.Cir.1977):

> The facts in *South-Eastern Underwriters* are a useful guidepost. Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion, or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a rate-setting context something in the way of enforcement activity would be

> required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.

Id. at 274 (citation omitted).[19]

This interpretation of boycott and coercion has been consistently followed, in the context of coverage as well as rates. *See, e.g., Meicler v. Aetna Cas. and Sur. Co.*, 506 F.2d 732, 734 (5th Cir.1975) (parallel actions of insurance companies to refuse to offer insurance except under rate regulation scheme adopted by state not a boycott); *UNR Indus. Inc. v. Continental Ins. Co.*, 607 F. Supp. 855, 862-63 (N.D.Ill.1984) (conspiracy among insurance companies to refuse to offer occurrence policies not a boycott); *Grant v. Erie Ins. Exch.*, 542 F. Supp. 457, 464-66 (M.D.Pa.1982) (conspiracy to refuse to offer insurance covering work loss benefits of individuals killed in motor vehicle accidents not a boycott) *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 314 (1983).

Professors Areeda and Hovenkamp concur with this view and reject the interpretation of *Barry* urged by plaintiffs:

> The implications of *St. Paul* are not clear. On the one hand, a horizontal agreement among competitors to set the terms of insurance policies—for example, price fixing—is a collective agreement not to deal on any other terms; by the agreement, each enlists the aid of the other, a third party, "to compel capitulation by the boycotted group," namely, insurance buyers. In this sense, virtually any horizontal agreement among competitors could be called a "boycott."
>
> However, there are two reasons for supposing that the Supreme Court did not mean to go that far. First, such a reading would eviscerate the immunity for horizontal agreements on the "business of insurance" and thus

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19 The *Proctor* court referred to the Supreme Court's opinion in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which described the conduct of defendants as consisting of coercion and intimidation to force non-member insurance companies into the conspiracies and to compel persons who needed insurance to buy only from South-Eastern Underwriters on its terms.

> seems inconsistent with the statute. Second, *St. Paul* itself did not involve an agreement to adopt similar terms. Instead, it was alleged that three insurers withdrew from the market for an anticompetitive purpose.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.2, at 107-08 (Supp. 1988).

The gravamen of the cases before the Court is alleged horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance. By joint action in the ISO and in the reinsurance and umbrella and excess insurance markets, the various defendants sought to bring about the use of policies that would limit their exposure. There is no charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others.[20]

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20 At the hearing, plaintiffs argued that ISO's withdrawal of statistical support for the 1973 policy forms after regulatory approval had been given by the relevant states to new forms amounted to coercion. The complaints allege in relevant part:

> On July 1, 1987, ISO officially withdrew "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions. (Cal. Compl't ¶ 99; Conn. Compl't ¶ 103.)

The conduct alleged, termination of statistical support for a superseded policy form, is on its face reasonable conduct that one would expect in the normal course of business. There is nothing inherently coercive or wrongful about it. There is no allegation that any insurer desired to continue to write insurance on the 1973 policy form but was coerced by defendants into not doing so by means of this conduct, and plaintiffs did not offer to amend their complaints or conduct specific discovery on this point. The allegation that "most ISO members" would find it "difficult and expensive . . . to duplicate the critical ISO support functions" is not sufficient to warrant subjecting these defendants to an antitrust action. *See* Ocean State Physicians Health Plan Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101, 1109 n. 9 (1st Cir. 1989) ("Coercion [under the McCarran Act] has not generally been interpreted to include situations where options have not been

The distinction between prohibited boycott and coercion and immune joint activities is illustrated by *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, ____ U.S.____, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989). That court held that "the practice of mere price fixing, i.e. a refusal to deal except at a specified price, without more," is not a McCarran Act boycott. *Id.* at 1561. "The crucial element . . . [of a boycott] is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." *Id.* at 1561, n.14 (quotation omitted). In reversing a grant of summary judgment of no boycott, the *Workers' Compensation* court relied on evidence of an agreement to exclude competing insurers from membership in the Minnesota Rating Association; such membership was required by Minnesota law as a condition to writing workers' compensation insurance in the state. *Id.* at 1563. In contrast, in the instant case the allegations are limited to collective refusals to do business except upon terms acceptable to defendants. There is not even a suggestion that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market.

The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development process to the risk

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entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). To hold otherwise would be somewhat ironic, for it is the McCarran Act that allows the insurance industry, including defendants, to provide through ISO the support functions which plaintiffs regard as critical; it makes little sense then to impose antitrust liability on defendants, who are permitted by the McCarran Act to agree to provide the support, for agreeing to discontinue it as to a policy form no longer in use.

of antitrust liability for using the product of that process would effectually nullify the McCarran Act. It makes no sense, therefore, for the plaintiffs to rest their boycott claim on the allegation of such an agreement. It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

What the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant (even if such agreements would otherwise violate Section 1), such as refusals to deal on any terms and exclusion from alternative sources. *See Barry*, 438 U.S. at 544-45, 98 S.Ct. at 2931. Such conduct is not charged here.

Dismissal of a complaint for failure to state a claim is not proper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). But judgment of dismissal is appropriate if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir.1988). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *Id.*

Under the well-pleaded allegations of these complaints, plaintiffs could prove no boycott or coercion. Plaintiffs do not suggest that their pleadings could be amended to cure their deficiencies.

Nor have plaintiffs come forward with specific facts which raise a triable issue as to boycott or coercion. And this is true though plaintiffs in their capacity as state regulators conducted lengthy investigations under their regulatory laws which gave them extensive access to the files and records at least of the domestic defendants as well as to other sources of relevant information. Plaintiffs have been given the opportunity also to conduct relevant discovery and have not sug-

gested that they needed discovery to be able fairly to meet this motion.

Accordingly, all defendants are entitled to dismissal of the complaints without leave to amend, or in the alternative summary judgment (considering defendants' submissions outside the pleadings), on all federal law claims in the various complaints. In addition all defendants are entitled to judgment on the Sixth and Seventh Claims of the First Wave Complaints and the Fourth and Sixth Claims of the Second Wave Complaints for failure to allege boycott, coercion, or intimidation. *See Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982).

The foreign reinsurer defendants named in the Fifth, Sixth, and Eighth Claims of the First Wave Complaints and the Third, Fourth, and Fifth Claims of the Second Wave Complaints have joined in this motion as an alternate ground for dismissal. They have also made a motion to dismiss on the ground of international comity which the Court grants. (*See infra* § V.E(3).) Because that motion rests on the proposition that those defendants are not subject to the antitrust laws, it raises the question whether, as a result, they also are not subject to state regulation to a degree sufficient to be entitled to McCarran Act immunity. It does not appear necessary to resolve that issue here, however; if the dismissal on comity grounds is sustained, the alternative ground for dismissal under the McCarran Act will be moot. Conversely, if it is not sustained, it will be because American regulatory laws apply to them and hence the McCarran Act as well.

B. *STATE ACTION IMMUNITY, STATUTORY INTERPRETATION, AND CAUSATION*

Defendants have moved for summary judgment with respect to those claims which "relate to the collective form-making process in those states that took action to approve, disapprove or withhold approval of the revised ISO CGL forms." (Def. Memo. 1.) This motion, therefore, is limited in its scope; it does not reach conduct outside of the collective activities to revise the CGL policy forms and it does not

apply to plaintiff states, or plaintiffs in states, that do not have a procedure for approval, disapproval, or withholding approval of policy forms, namely Alaska, California, Colorado, and Montana. Because plaintiffs' opposition memorandum either misconceives or ignores the narrow scope of this motion, its arguments are in large part irrelevant.

(1) *State Action Immunity*

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1934), the Supreme Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. The circumstances under which this state action immunity extends to private parties were defined in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,' and, second, the State 'must supervise actively any private anticompetitive conduct.' " 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (Brennan, J.)).

(a) *State Policy*

There is no question that all of the states have clearly articulated and affirmatively expressed policies permitting collective policy form development activities. Each of the states has licensed ISO and its members to engage in certain collective activities, including filing of rates and policy forms and developing policy forms.

These actions are governed by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There the Supreme Court applied state action immunity to collective rate making activities under state laws permitting—but not requiring—motor carriers to agree on rates subject to the supervision of the state public service commission having authority to accept, reject, or modify the agreed rates. The same situation is pre-

sented here. The states have authorized the insurers to agree on policy forms subject to the supervisory authority of the insurance regulators. Most of the states require regulatory approval before a form may be used; others permit a form to be used unless or until the regulators disapprove it. (Def. Memo. 5-6.) And here, as in *Southern Motor Carriers Rate Conference*, insurers were not required to participate in the collective activities of ISO and were free to use policies other than those developed and sponsored by ISO.

Plaintiffs argue that the states have authorized only voluntary joint action, not coercion or boycotts. But the fact that the states prohibit coercion and boycotts does not diminish the immunity flowing from the authority to conduct collective policy development activities. That immunity depends on the presence of active state supervision, as discussed below, and the states' prohibition of coercion and boycott is simply one aspect of this supervision. To argue that the presence of such state law prohibitions nullifies the state action immunity would be to turn the doctrine on its head. The premise of that doctrine is that it immunizes conduct that might otherwise run afoul of the antitrust laws. It does so "to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Carriers Rate Conference*, 471 U.S. at 61, 105 S.Ct. at 1729. It achieves that end by allowing states "to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties." *Id.* at 66, 105 S.Ct. at 1731. Under the regulatory schemes of the relevant states, insurers are permitted to engage in collective policy development but are not required to do so or to adopt the collectively produced policies; activities directed to an insurer's individual decision what coverage to offer, as distinct from what terms to include in ISO policy forms, are not claimed to be covered by state action immunity and are not addressed by this motion.

Plaintiffs' reliance on *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), is misplaced. That case held that defendant did not, by reason of having been designated by the state as an exclusive ambulance dispatcher,

become immune against a claim that it had restrained competition in the market for air ambulance services. The immunity which attached to dispatch services did not extend to activities in the separate and distinct market for ambulance services. But that reasoning does not apply where, as here, the restraint complained of occurred (though not exclusively) in the course of the protected conduct, i.e. the collective development of terms for policies to be issued by the participating insurers, which was exactly what the states permitted to be done.

(b) *State Supervision*

State action immunity applies only where the state actively supervises "to ensure that [it] will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). Plaintiffs argue that state supervision in this case does not reach the restraints alleged, i.e., "the agreements and acts to limit or eliminate the availability of consumer-demanded coverages." (Unified Opp. 58.) But in *Patrick*, the Court specifically referred to the state public service commission's "ultimate authority and control over all intrastate rates" in *Southern Motor Carriers Rate Conference* as an example of what constitutes active supervision. *Id.* (quoting *Southern Motor Carriers Rate Conference*, 471 U.S. at 51, 105 S.Ct. at 1723). As noted above, there, as here, supervision took the form of approval, disapproval, or modification of the end product of the collective action. That degree of supervision was sufficient protection of the public interest, without the necessity of additional supervision of the manner in which the participants conducted the collective process.

Plaintiffs contend that, even if the state action immunity otherwise applied, its application here is barred by the McCarran Act which, they contend, specifically reserves application of the Sherman Act to boycott and coercion. *Cf. Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d

1075, 1078-79 (4th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). The two immunity doctrines are not congruent and need to be distinguished with care. The McCarran Act, as discussed in section V.A., *supra*, grants to the insurance business a limited immunity from the antitrust laws, conditioned on a degree of state regulation. State action immunity, as discussed here, permits the states to displace the antitrust laws with respect to specified activities actively supervised by the states. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 210.1b, 212.1f, at 113 (Supp. 1988) ("The [Supreme] Court's view of federalism [under *Parker v. Brown*] has left enormous discretion to the states to displace competition."). Plaintiffs' contention was most recently addressed and rejected in *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1027 n.10 (8th Cir. 1988), where the court stated that it would be anomalous to hold that Congress, by adopting the McCarran Act, intended to subject insurance companies to antitrust liability for actions that would be exempt if engaged in by others.

The state action immunity motion must therefore be granted.

(2) *Statutory Interpretation*

Defendants also contend that because the effects complained of resulted from the actions of the states which approved the use of the revised policy forms, there could have been no restraint of trade. Their reliance on *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd.*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983), is, however, misplaced. The restraint complained of in that case flowed from the decision of airport authorities not to lease space to plaintiffs. The fact that that decision may have been influenced by a conspiracy among defendants did not make the defendants responsible for the airport authorities' independent exercise of judgment to exclude plaintiffs. In the instant actions, however, the restraints complained of did not

flow from the actions of state regulators who approved or disapproved policy forms; they flowed from the collective actions of defendants by which they allegedly sought to bring about the use of policy forms that restricted available insurance coverage. To the extent that their conduct is not immune from antitrust scrutiny, defendants would be responsible for its consequences.

Defendants also argue that plaintiffs cannot demonstrate the existence of a restraint in the policy form development process. (Reply 1-10.) The argument seems to rest on confusion between Sherman Act liability and the effect of the McCarran Act. There is little question that, in the absence of McCarran Act immunity, allegations of collective action by defendants to bring about reduced coverage for purchasers of insurance would state a claim under Section 1:

> There is no doubt that the members of such [trade] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988). It would not matter for purposes of Section 1 that, as defendants argue, the collective action of defendants did not limit an individual insurer's ability to offer broader coverage. (Reply 5.) The individual insurer's continued freedom is relevant only to application of Section 1013(b) of the McCarran Act, the boycott exclusion, not to liability for anticompetitive agreements.

The motion based on statutory interpretation must therefore be denied.

(3) *Causation*

The foregoing analysis also disposes of defendants' contention that plaintiffs were not injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). No states required insurers to adopt the approved forms. Hence, injury flowing from prohibited collective action to coerce competitors to restrict coverage or deny consumers access to insurance coverage, unless otherwise immune, would fall within Section 4 of the Clayton Act.

There being no disputed issues of fact material to the disposition of this motion, and for the reasons stated, defendants' motion for summary judgment on all claims based on defendants' participation in the collective policy development process asserted by states, and plaintiffs in states, other than Alaska, California, Colorado, and Montana must be granted on the ground of state action immunity, but will otherwise be denied.

C. *STANDING*

The domestic and foreign reinsurer defendants[21] have moved to dismiss the complaints against them on the ground that plaintiffs do not have standing to complain of actions taken in the reinsurance and retrocessional insurance markets.[22]

The reinsurer defendants characterize the complaints as alleging three distinct insurance markets: primary insurance, reinsurance, and retrocessional insurance. They contend that plaintiffs claim to have participated only in the primary insurance market and that the defendant reinsurers are alleged to have conspired only in the reinsurance and retrocessional insurance markets. On this basis, defendants contend that plaintiffs do not claim to have been directly affected by the alleged conduct of these defendants and that,

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21 All defendants other than ISO, INA, Hartford, Allstate, Aetna, and CIGNA.

22 This motion does not include the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.

therefore, plaintiffs do not have standing to assert the antitrust claims pleaded.

To have standing to assert an antitrust claim, a plaintiff must allege that it has suffered harm as a direct result of the defendant's conduct and that this harm is within the scope of the protection of the antitrust laws. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982). Accepting, as the Court must, the allegations of the complaint, they establish that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. As discussed in section V.A(1), *supra*, plaintiffs' contention is that the reinsurers' alleged conspiracy to eliminate reinsurance for certain CGL coverages "led inexorably to an injury . . . in the interrelated primary insurance market."

The claims against these defendants therefore fall within the analysis in *McCready*, in which a Blue Cross subscriber was found to have standing to challenge an alleged conspiracy between Blue Cross and psychiatrists to deny reimbursement of psychologists' services. Though the restraint occurred in a market (the market for psychiatrists' services) in which plaintiff was not a consumer, the Court reasoned that plaintiff had standing:

> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely " 'the type of loss that the claimed violations . . . would be likely to cause.' "

457 U.S. at 479, 102 S.Ct. at 2548 (citations omitted). And that was true even though plaintiff's plan coverage was purchased and paid for by her employer; as a consumer of psychotherapy services, she nevertheless was within the area of the economy threatened by a breakdown of competitive conditions resulting from Blue Cross's refusal to reimburse for services she desired.

Plaintiffs' allegations suffice to establish agreements the direct effect of which, if true, would be to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), is distinguishable. There the plaintiff unions complained of a conspiracy by defendants to abrogate or weaken the collective bargaining relationship between the unions and employers. As the Court there observed, "the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539, 103 S.Ct. at 909. And it was "not clear" whether the Union's interests would be served or disserved by enhanced competition in that market. Moreover, the claim of causation between the Union's injury and the alleged restraint contained "somewhat vaguely defined links." *Id.* at 540, 103 S.Ct. at 909.

On the face of the allegations, plaintiffs have standing. The motion based on lack of standing must be denied.

D. *GLOBAL CONSPIRACY CLAIM*

Foreign reinsurer defendants have moved to dismiss the First Claim of the Second Wave Complaints, the so-called global conspiracy claim. That claim alleges that all defendants, including the moving defendants, engaged in a conspiracy to restrain the market for CGL property and casualty risks and for reinsurance and retrocessional reinsurance by agreeing to limit or eliminate occurrence, pollution, retroactive, and long-tail coverage, which are the subjects of the allegations of the complaints. In other words, this claim links all of the various specific claims of wrong-doing by various

groups of defendants in various markets to allege one global conspiracy among all defendants.

The moving defendants are foreign reinsurers doing business in London. They are named in the Second, Third, and Sixth claims of the Second Wave Complaints in connection with discrete conspiracy claims. They make this motion on the ground that the First Claim merely lumps together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy. (Def. Memo. 4.) No question is raised as to the sufficiency of the pleading of the discrete conspiracies in the other claims.

Plaintiffs respond that the complaints "allege that all of the defendants were conspirators who intended to prevent the States from obtaining consumer-demanded insurance coverages." (Unified Opp. 106.) Plaintiffs' theory is that because "the conspiracies alleged are linked by a common purpose, by overlapping defendants and by interconnected acts," a jury could find a single global conspiracy among all the participants in the separate conspiracies. (*Id.* at 109-10.)

A conspiracy is a combination of two or more persons acting in concert to accomplish a common unlawful purpose. A coconspirator need not know the identity of all other conspirators or the full extent of the conspiracy. *E.g.*, *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 450-51 (10th Cir. 1984). But there must be a common agreement and understanding. Mere identity of purpose, interconnected events, and shared participants, on which plaintiffs base their claim, do not link separate conspiracies into one overall, single conspiracy. (*See* Unified Opp. 110-12.) For separate activities to result in a single conspiracy, the allegations and proof must reflect a wheel and spoke arrangement in which a single person at the hub implements the conspiracy by a series of arrangements with others to carry out the purpose of their conspiracy. *See*, *e.g.*, *United States v. Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977). But such separate activities, even if for a common purpose, do not constitute a conspiracy "without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239,

1243, 90 L.Ed. 1557 (1946). There must be a connection among all the alleged participants sufficient to support a finding that they had entered into the alleged conspiracy. *Id.* at 754, 66 S.Ct. at 1242. *See also Pinhas v. Summit Health, Ltd.*, 880 F.2d 1108 (9th Cir. 1989) ("Pinhas alleges . . . that as a result of his refusal to sign the 'sham' contract, appellees entered into a conspiracy . . . to suspend and terminate his medical staff privileges . . . and to have the report of his termination disseminated. . . .") (emphasis added).

Plaintiffs have made no attempt to show the existence of such a connection to support a finding of a single overall conspiracy, and the allegations of the complaint would not permit proof of one. They allege a number of different conspiracies having different members and different subject matter. For example, the Fifth Claim of the Second Wave Complaints charges some defendants, some of whom are not named elsewhere, with having conspired to restrict the terms under which property insurance and reinsurance would be provided for North American risks. Property insurance has not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. Thus, if all of the facts alleged in the complaint were proved at trial, a conspiracy verdict against these defendants under the First Claim could not stand. The motion of these defendants to dismiss the First Claim of the Second Wave Complaints must therefore be granted.[23]

E. *SUBJECT MATTER JURISDICTION AND COMITY*

The defendants named in the Sixth and Eighth Claims of the First Wave Complaints and the Fourth and Fifth Claims of the Second Wave Complaints[24] have moved to dismiss

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23 At the hearing, the remaining defendants joined in this motion. No objection having been made, this claim will be dismissed against all defendants.

24 These claims will be referred to collectively as the Sixth Claim and the Eighth Claim, respectively.

those claims for lack of subject matter jurisdiction or on the basis of international comity.[25] The motion is based on the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 ("FTAIA"), and on the doctrine of international comity as stated in *Timberlane Lumber Co. v. Bank of America*.[26]

The following allegations are relevant:

In the Fifth Claim, plaintiffs allege that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure risks written on the occurrence form or "long-tail" risks. They allege agreements among defendants, coercion and intimidation of primary insurers to use the claims-made form and reject the occurrence form, and coercion and intimidation of individuals who might communicate with regulatory bodies. (Conn. Compl't ¶¶ 91, 93, 127-128; Cal. Compl't ¶¶ 87, 89, 133-134.) As a result, it is alleged that occurrence liability has become unavailable for many risks and the price of such coverage has increased. (Conn. Compl't ¶ 129; Cal. Compl't ¶ 135.)

In the Sixth Claim, plaintiffs allege that, at a meeting in London, the defendant London reinsurers and one reinsurance broker agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion (Conn. Compl't ¶ 99; Cal. Compl't ¶ 95) lessening the availability and affordability of pollution liability coverage from primary insurers throughout the United States (Conn. Compl't ¶ 97; Cal. Compl't ¶ 93).

In the Eighth Claim, plaintiffs allege that a group of London retrocessional reinsurers, including the seven named

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25 At the hearing these defendants asked that their motion be treated as encompassing also the Fifth Claim of the First Wave Complaints and the Third Claim of the Second Wave Complaints (collectively referred to as the Fifth Claim). No objections having been made, the issues having been fully briefed, and in the absence of prejudice to plaintiffs, this request is granted.

26 *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) ("*Timberlane I*"), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

defendants, agreed in 1987 to boycott retrocessional reinsurance treaties which included coverage for North American property risks, unless the original insurance coverage contained a seepage, pollution, and contamination exclusion clause. (Conn. Compl't ¶ 138(b); Cal. Compl't ¶ 149(b).) As a result, seepage and pollution coverage has been excluded from policies on American risks, and prices for such coverage have been increased. (Conn. Compl't ¶ 139; Cal. Compl't ¶ 150.)

(1) *The Factual Background*

The London insurance markets in which the defendants named in the Fifth, Sixth, and Eighth Claims conduct their reinsurance and retrocessional reinsurance business are composed of underwriters at Lloyd's of London, other London insurance firms ("London Company Market" firms), and brokers who obtain coverage in these markets. *See, e.g., Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982); *Syndicate 420 at Lloyd's, London v. Early American Ins. Co.*, 796 F.2d 821, 824 (5th Cir. 1986); *Travelers Indemnity Co. v. Booker*, 657 F. Supp. 280, 282-83 (D.D.C. 1987).

As described in *Edinburgh Assurance*, the purchase and sale of insurance in London takes place on the floor of the underwriting room at Lloyd's and in the offices of individual insurance companies. A Lloyd's or London Company Market agent evaluates and negotiates proposed insurance placements brought by brokers for the consideration of the syndicate of underwriters that the agent represents.[27] 479 F. Supp. at 145. A "slip" (a broker-originated document containing the essential features of the coverage sought) is presented to each underwriter. *Id.* Because many risks are too large to be insured by just one London market participant, the broker

27 Underwriters at Lloyd's must be individuals trading for their own accounts. However, underwriters band together into syndicates represented by one or more underwriting agents. Department of the Treasury, Report to Congress on the Taxation of Income Earned by Members of Insurance or Reinsurance Syndicates 5-6 (February, 1989).

circulates the slip among numerous underwriting agents, each of whom makes the individual decision whether to underwrite a portion of the risk. *See id.* Because the spreading of large risks in the London reinsurance and retrocessional insurance markets necessarily requires numerous subscribers (*see* Conn. Compl't ¶ 4(w); Cal. Compl't ¶ 28), negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the market. Underwriters negotiate with brokers over the terms on which they are willing to accept a risk. Because different underwriters may be willing to accept a particular risk on different terms, brokers and underwriters may have to negotiate mutually agreeable terms and conditions on which that risk will be accepted. *See Edinburgh Assurance*, 479 F. Supp. at 145.

The sequence of insurance transactions resulting in the purchase of reinsurance and retrocessional reinsurance in the London markets begins with the purchase of primary insurance by the consumer. The primary insurer in the United States may then elect to reinsure some portion of the portfolio of risks it has underwritten. (Conn. Compl't ¶ 4(p); Cal. Compl't ¶ 26.) The form of reinsurance most pertinent to these cases is known as "treaty" reinsurance (Cal. Compl't ¶ 27), in which the reinsurance company agrees in advance to indemnify a primary insurance company for a defined portion of the risks to be assumed by the primary carrier during the treaty period (Conn. Compl't ¶ 4(w); Cal. Compl't ¶¶ 4(p), 27). As a participant in a reinsurance treaty, a reinsurer does not deal directly with primary insurance consumers or individual risks and may never know the identity of individual risks within the portfolio of risks included in the treaty. *See Excess and Casualty Reinsurance Ass'n v. Ins. Comm'r*, 656 F.2d 491, 492, 495 (9th Cir. 1981); *American Re-Insurance Co. v. Insurance Comm'r*, 527 F. Supp. 444, 453 (C.D. Cal. 1981). When the primary insurer seeks reinsurance coverage in the London market, one of several reinsurance centers, it initiates the type of reinsurance transaction which is the subject of the Sixth Claim.

Reinsurers also purchase reinsurance. This step in the sequence of reinsurance transactions, and the one which is

the subject of the Eighth Claim, may occur in the London market for retrocessional reinsurance. Retrocessional reinsurance means reinsurance of the business written by reinsurers. (*See also* Conn. Compl't ¶ 4(r); Cal. Compl't ¶ 107.) Plaintiffs' Eighth Claim refers to the so-called LMX market which consists of those retrocessional reinsurers who specialize in providing retrocessional reinsurance for Lloyd's of London and the London Company Market firms. (Conn. Compl't ¶ 111; Cal. Compl't ¶ 107.) At this level, the purchaser of retrocessional reinsurance is a Lloyd's or London Company Market reinsurer.

(2) *Subject Matter Jurisdiction*

By virtue of the FTAIA, the Sherman Act does "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . ." unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, import trade into the United States, or export trade engaged in by a person within the United States. 15 U.S.C. § 6a.

Plaintiffs contend that the conduct alleged involved agreements to restrain the provision of reinsurance for American risks, and hence the import into the United States of insurance services. These allegations are sufficient to invoke the import exception of the FTAIA.

Defendants contend that the FTAIA applies nevertheless because the conduct complained of in these claims is wholly foreign commerce. The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce.

The First Wave Complaints allege that the London market is one of the three principal markets for the supply of reinsurance (Cal. Compl't ¶ 29), and all complaints allege that the agreements made in the London market had the effect of limiting the ability of primary insurers to obtain reinsurance except on certain terms, and for a higher price (Conn.

Compl't ¶¶ 97, 100, 134, 139; Cal. Compl't ¶¶ 138, 140, 148, 150). The complaints further allege that the availability of primary coverage hinges on the primary insurers' ability to obtain reinsurance of risks (Conn. Compl't ¶ 4(p); Cal. Compl't ¶ 34), and that the availability of reinsurance hinges on the availability of retrocessional reinsurance (Conn. Compl't ¶¶ 110, 114; *see* Cal. Compl't ¶ 150). Thus, plaintiffs have adequately alleged that a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States. *Cf. McGlinchy v. Shell Oil Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (no direct, substantial, and reasonably foreseeable effect on United States commerce where agreements involved orders for products in South East Asia and other areas outside the United States). Therefore, the FTAIA does not apply.

Where the FTAIA does not apply, the Court must determine whether it has subject matter jurisdiction under the analysis in *Timberlane I*: (1) whether the alleged restraint affected or was intended to affect the foreign commerce of the United States, and (2) whether it is a cognizable violation of the Sherman Act.[28] 549 F.2d at 615. The allegations that

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28 There is some uncertainty whether the *Timberlane* analysis for extraterritorial application of the antitrust laws has been superseded by the FTAIA. It is arguable that the FTAIA codifies the standard for determining whether there is extraterritorial jurisdiction for all cases, not only for those cases involving non-import trade. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236, at 235 (Supp. 1988) ("The most interesting question about the new statute is whether its standard for appraising export restraints differs from that for appraising import restraints or whether it merely 'codifies' a general understanding of when American antitrust should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or unforeseeably."); Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 Fordham L. Rev. 201, 222 (1982) ("[i]t is . . . not clear whether the specific effect test set forth in the Act is limited to determining whether export transactions of purely foreign transactions have the requisite effect on United States trade. The test might also be used in determining whether *import* transactions . . . have the requisite effect on United States trade.") See also the dictum in *McGlinchy*, 845 F.2d at 813 n.8, that the FTAIA was passed "[i]n an effort to provide a single standard for the issue of extraterritorial

establish a direct effect in the United States are sufficient to establish this Court's subject matter jurisdiction under *Timberlane I*.

(3) *International Comity*

Regardless of whether subject matter jurisdiction exists, this Court may determine that its jurisdiction under the antitrust laws should not be exercised on the ground of international comity. *See Timberlane I*, 549 F.2d at 613-14.[29] This issue is properly raised and disposed of by a Rule 12(b)(1) motion so long as the merits of plaintiffs' antitrust claims are not reached. *Timberlane II*, 749 F.2d at 1382.

Timberlane I established a rule of reason controlling the extraterritorial application of the antitrust laws. It requires an analysis of whether, as a matter of international comity and fairness, extraterritorial jurisdiction should be asserted. *Timberlane I*, 549 F.2d at 615.

This analysis is governed by seven factors:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the viola-

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application of the Sherman Act." In that case, however, the FTAIA clearly applied because export and foreign transactions were involved.

Until there is a clearer indication that *Timberlane I* no longer controls, however, this Court must follow it.

29 The legislative history of the FTAIA states that "[i]f a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd Cir. 1979) [sic]." H.R. Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 2431, 2487, 2498.

tions charged of conduct within the United States compared with conduct abroad.

Id. at 614. Each of these seven factors, discussed below, must be balanced in every case. *Timberlane II*, 749 F.2d at 1383 n.3; *see also, Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) (applying *Timberlane* factors to extraterritorial application of the Lanham Act); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9th Cir. 1977) (same). The object of this analysis is to determine whether "the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction." *Timberlane I*, 549 F.2d at 614-15.[30]

(a) *Degree of Conflict With Foreign Law or Policy*

The London reinsurance and retrocessional reinsurance business, the subject of these claims, takes place in a regulatory and competitive framework established by the British government. In 1870, Parliament, by the Lloyd's Act, established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. The Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activities of its members. Lloyd's Acts, 1870-1982. The London Company Market companies are incorporated in the United Kingdom in accordance with the Companies Act, 1985, are regulated by the Insurance Companies Act, 1982, and associated regulations, and are supervised by the British Department of Trade and Industry. Agreements among British insurers, reinsurers, and retrocessional reinsurers (including both Lloyd's and

30 *Timberlane* has been criticized for requiring courts to balance American and foreign interests which they are not equipped or qualified to do. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (substantial limits on court's ability to conduct balancing); Aldisert, *Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?*, 5 J. L. & Com. 415, 419-20, 426-29 (1985) (courts unaccustomed to evaluating interests of other nations); Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 Yale L.J. 1693 (1985) (courts poorly equipped). Its authority in this circuit, however, remains unimpaired.

London Company Market underwriters) relating to the provision of insurance services are expressly exempted from British regulation of anticompetitive agreements. *See* Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8.

Plaintiffs argue that, because the Treaty of Rome of 1957, which governs trade regulation in the European Economic Community, is part of the law of England, *In re Westinghouse Uranium Contract* [1978] A.C. 547, 564, there is no conflict with English law or policy. Article 85 of the treaty prohibits

> all agreements . . . and concerted practices . . . which have as their object and effect the prevention, *restriction* or distortion *of competition within the common market* and in particular those which: (a) . . . fix purchase or selling prices or any other trading condition; [or] (b) limit or control production, markets, technical development, or investments. . . .

(Emphasis added.) Article 85 has been held to outlaw restrictive practices in the insurance industry notwithstanding its regulation by the state in which it is located. *Verband der Sachversicherer eV v. E.C. Commission*, 4 Common Mkt. Rep. (CCH) 264 (1988). Article 85, plaintiffs contend, establishes that enforcement of American antitrust law is consistent with applicable foreign law.

It seems doubtful, however, that this Article would be applied to outlaw long-standing practices in the London reinsurance market, openly conducted in conformity with English law. Moreover, the Treaty of Rome by its terms applies only to trade between member states, not to trade with a nonmember such as the United States, and Article 85 applies only to restriction of competition within the common market.

With respect to the relevant United States-English trade, the evidence of conflict between the antitrust laws and English law and policy is substantial. English courts have repeatedly expressed unmitigated hostility to the extraterritorial application of American antitrust laws. *See In re Westinghouse Uranium Contract*, 1978 A.C. 547, 591 (counsel

for the government), 616 (Judgement of Lord Wilberforce), 639 (Judgement of Lord Diplock), 650 (Judgement of Lord Fraser of Tullybelton); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (CA), (LEXIS, Enggen library, Cases file at 10) (Judgement of Sir Evershed, M.R.). *See also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 946 (D.C. Cir. 1984).

An English "blocking" statute restricts the availability of evidence and production of documents for use in judicial proceedings in the United States. Protection of Trading Interests Act, 1980, ch. 11, § 2, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1; *see* Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum. L. Rev. 1097, 1106-09 (1981) (describing the blocking provision of the Protection of Trading Interests Act). The Protection of Trading Interests Act provides a remedy to English antitrust defendants to recover from plaintiffs the punitive portion of a foreign multiple damage judgment against them where the foreign judgment concerns activities outside the enforcing nation's territory.[31] Protection of Trading Interests Act, *supra*, at § 6; *see* Note, 81 Colum. L. Rev. at 1109-13 (describing section 6 of the Act). This Act has been applied several times notwithstanding the Treaty of Rome. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247, 251-52 & n.29 (1982) (between its passage and 1982, the Act applied to issuance of directives barring compliance with American orders, some of which involved U.K. subsidiaries of U.S. parents).

On balance, the Court concludes that enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors

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31 This ("clawback") provision was aimed at the "pernicious extraterritorial effect doctrine" of American antitrust law. 973 Parl. Deb., H.C. (5th Series) 1535 (1979). It also reflects a view that multiple damages are penal and should be imposed only in proceedings incorporating the protections of criminal proceedings. *See* Note, 81 Colum. L. Rev. at 1103-04.

in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.

(b) *The Nationality or Allegiance of the Parties and the Locations of Principal Places of Business of Corporations*

All plaintiffs are located in the United States. Although all defendants named in the Fifth, Sixth, and Eighth Claims are located in England and are of English nationality, many of the corporate defendants are subsidiaries of American corporations and may be influenced by the allegiance of their American parents.[32] But it is also true that adjudication of this claim would require the testimony of witnesses and the production and analysis of documents located in England. *See Timberlane II*, 749 F.2d at 1384; *Star-Kist*, 769 F.2d at 1396.

On balance this factor weighs against the exercise of jurisdiction.

(c) *The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance*

A number of barriers stand in the way of enforcement of any judgment against these defendants by English courts. Those courts have previously refused to aid in the enforcement of the judgment of an American court where that court had exercised what the English court considered unlawful extraterritorial jurisdiction. *See British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, 1 Ch. 19 (1953); 1 Ch. 37 (1955); *see also* the discussion at section V.E.(3)(b), *supra*.

Plaintiffs could collect a judgment by enforcing it against such assets of defendants as may be found in the United States. But it is improbable that there could be enforcement

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32 Note that England, however, does not recognize the extraterritorial application of the laws of the parent corporation's state based on the parent's control of the subsidiary. Note, 81 Colum. L. Rev. at 1100-01. English authorities, moreover, take the position that, in any event, the laws and policies of the territorial state must be accorded primacy. *See* Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Law*, 18 Stan. J. Int'l L. 279, 286 (1982).

of the requested injunctive relief against activities in London. Indeed, the Protection of Trading Interests Act allows the British Secretary of State for Industry to forbid British nationals from complying with foreign antitrust judgments. Protection of Trading Interests Act, *supra*, at § 1; *see* Note, 81 Colum. L. Rev. at 1104-06.

Thus this factor tips slightly against the exercise of jurisdiction.

(d) *The Relative Significance of Effects on the United States as Compared With Those Elsewhere*

This factor requires a comparison of the effect of the alleged illegal conduct on the commerce of the United States with its effect abroad. *Timberlane II*, 749 F.2d at 1384.

Plaintiffs allege that half of the reinsurance business covers North American risks. (Conn. Compl't ¶ 4(h); Cal. Compl't ¶ 4(t).) There are no allegations showing what percentage of those risks involved reinsurance for CGL policies covering risks within the United States. And there are no allegations with respect to the relative effects of retrocessional reinsurance agreements. It is clear, however, that the conduct of defendants had a sufficiently significant effect in the United States to make this factor weigh in favor of the exercise of jurisdiction.

(e) *The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce*

As in *Timberlane II*, the conduct of defendants complained of in these claims was directed primarily at reducing their exposure to certain risks and controlling losses, a legitimate business purpose. Their actions (as described in section V.E(1) *supra*) were "consistent with [local] customs and practices." *Timberlane II*, 749 F.2d at 1385. The allegations of the complaints that defendants' purpose was to restrict the availability of certain types of CGL coverage (Conn. Compl't ¶¶ 132, 137; Cal. Compl't ¶¶ 138, 148) is not inconsistent

with the existence of a legitimate business purpose for their actions.

This factor, therefore, weighs against the exercise of jurisdiction.

(f) *Foreseeability of Such Effect*

Defendants concede that the factor of foreseeability of the effect in the United States of their conduct weighs in favor of the exercise of jurisdiction. (Def. Memo. 23.)

(g) *The Relative Importance to the Violation Charged of Conduct Within the United States as Compared with Conduct Abroad*

The conduct of the defendant reinsurers or retrocessional reinsurers alleged in the Sixth and Eighth Claims is not alleged to have occurred within the United States. Some of the conduct alleged in the Fifth Claim, however, allegedly occurred in the United States. Defendants are alleged to have coerced primary insurers and to have communicated with others to bring about rejection of the occurrence form. Thus relevant conduct occurred within the United States, but its genesis lay in the alleged agreements among the participants in the London market and its purpose was to further those agreements. The alleged activities in the United States are an incident of the market agreement which is the gravamen of the action.

Although the activities within the United States are not insignificant, their significance derives from the alleged foreign agreements. In those circumstances, this factor must be considered as neutral.

(h) *Conclusion*

The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not

alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

The pendent state law claims assert claims similar to those arising under the federal antitrust laws. To the extent that they are based on the conduct alleged in the Fifth, Sixth, and Eighth Claims, they should be dismissed for the same reasons. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Salvesor v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984).

VI. CONCLUSION

Subsequent to the issuance of this ruling, plaintiffs for the first time asked for leave to amend their complaints. The Court has examined Attachment A to plaintiffs' memorandum to vacate judgment or for leave to amend or permit discovery, setting forth the substance of the proposed amendments. Nothing in that attachment would affect the grounds for the Court's ruling. The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law.

For the same reason, plaintiffs' discovery request must be denied. That request is based on rather unprofessional assertions to the effect that the Court criticized or faulted the states for not producing evidence or taking discovery and on a misrepresentation of the Court's ruling. (Plf. Memo. 12.) The States have conducted investigations into the subject matter of these actions for some two years, with all the investigatory powers available to sovereign governments. They were given the right under the pretrial order to conduct discovery relevant to the issues raised by defendants' motions. They are represented by numerous attorneys expert in the antitrust laws. The Court must conclude that the allegations they made in their complaints and the facts they proffered in opposition to the motions represent their best effort—and nothing indicates the contrary.

The Court's ruling accepts the facts alleged in plaintiffs' complaints and their opposition to the motions, and it rests on those facts. There are no factual disputes material to this ruling, which simply applies the law to those facts.

For the reasons stated, judgment will be entered for all defendants dismissing the federal claims in these actions in accordance with the foregoing ruling. The pendent state claims will be dismissed for lack of subject matter jurisdiction, except as otherwise ordered.

IT IS SO ORDERED.

APPENDIX

[To the District Court Opinion]

Actions in MDL Docket 767
Insurance Antitrust Litigation

88-0981 State of California, et al. v. Hartford Insurance Company, Aetna Casualty and Surety Company, CIGNA Corporation, Insurance Services Office, Inc., Peter N. Miller, Robin A.G. Jackson, Merrett Underwriting Agencies Mgt., Ltd., Three Quays Underwriting Ltd., Janson, Green, Ltd., Edwards and Payne Management (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., Harvey Bowring, Ltd.—Murray Lawrence & Partners, K.F. Alder & Others, (U.A.) Ltd., Unionamerica Insurance Co., Ltd.

88-0983 State of New York, et al. v. Hartford Fire Insurance Company, et al.

88-0984 Commonwealth of Massachusetts, et al. v. Hartford Fire Insurance Company, et al.

88-0985 State of Minnesota, et al. v. Hartford Fire Insurance Company, et al.

88-0986 State of West Virginia, et al. v. Hartford Fire Insurance Company, et al.

88-0987 State of Wisconsin v. Hartford Fire Insurance Company, et al.

88-0988 State of Alabama, et al. v. Hartford Fire Insurance Company, et al.

88-1009 State of Arizona, et al. v. Hartford Fire Insurance Company, et al.

88-1318 Big D Building Supply Corp. v. Hartford Fire Insurance Company, et al.

88-1492	Anastasios Markos T/A v. Hartford Fire Insurance Company, et al.
88-1587	Bay Harbor Park Homeowner's Association, Inc. v. Aetna Casualty
88-2327	State of Maryland v. Hartford Fire Insurance Company, et al.
88-2328	State of Washington, et al. v. Hartford Fire Insurance Company, et al.
88-2329	State of New Jersey v. Hartford Fire Insurance Company, et al.
88-2330	State of Colorado v. Hartford Fire Insurance Company, et al.
88-2331	State of Ohio, et al. v. Hartford Fire Insurance Company, et al.
88-2332	State of Connecticut v. Hartford Fire Insurance Company, et al.
88-2333	Commonwealth of Pennsylvania, et al. v. Hartford Fire Insurance Company, et al.
88-2334	State of Alaska, et al. v. Hartford Fire Insurance Company, et al.
88-2335	State of Montana v. Hartford Fire Insurance Company, et al.
88-2341	State of Michigan, et al. v. Hartford Fire Insurance Company, et al.
88-2569	Environmental Aviation Sciences, Inc. v. Hartford Fire Insurance Company, et al.
88-3662	Carlisle Day Care Center, Inc. v. Hartford Fire Insurance Company, et al.
88-3673	Discount Plywood Centers, Inc. v. CIGNA Corporation, et al.
88-3674	Acme Corrugated Box Co. v. CIGNA Corporation, et al.

88-3677 P & J Casting Corp. v. Hartford Fire Insurance Company, et al.

88-3792 Henry L. Rosenfeld v. Hartford Fire Insurance Company, et al.

88-3793 Ace Check Cashing, Inc. v. Hartford Fire Insurance Company, et al.

88-4538 Glabman Paramount Furniture Mfg. Co., Inc. v. CIGNA Corporation, et al.

88-4560 Durawood, Inc. v. CIGNA Corporation, et al.

88-4561 Bensalem Township Authority v. CIGNA Corporation, et al.

88-4562 Keyboard Communications, Inc. v. CIGNA Corporation, et al.

88-4564 Carmella M. "Boots" Liberto v. Hartford Fire Insurance Company, et al.

88-4799 Les-Ray Bobcat, Inc., et al. v. Hartford Fire Insurance Company, et al.

88-4800 Jerry Grant Chemical Associates, Inc. v. Hartford Fire Insurance Company, et al.

89-1131 State of Louisiana, et al. v. Hartford Fire Insurance Company, et al.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: INSURANCE ANTITRUST LITIGATION

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a Municipal Exxon; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, et al., Private Plaintiffs,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al.,

Defendants-Appellees.

No. 89-16405

DC # CV-88-1688-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al.,

Defendants-Appellees.

No. 89-16405

DC # CV-88-1688-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

vs.

INSURANCE SERVICES OFFICE, INC., CNA RE (U.K.) Ltd.; CONTINENTAL REINSURANCE CORPORATION, UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE Ltd.; EXCESS INSURANCE CO., Ltd.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, Inc.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellants.

No. 89-16513

DC #
CV-88-0981-WWS

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

No. 89-16514

DC # CV-88-0983-WWS

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

No. 89-16515

DC # CV-88-0984-WWS

STATE OF MINNESOTA,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,
Defendants-Appellees.

No. 89-16516

DC #
CV-88-0985-WWS

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,
Defendants-Appellees.

No. 89-16517

DC #
CV-88-0986-WWS

STATE OF WISCONSIN, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al., *Defendants-Appellees.*	No. 89-16518 DC # CV-88-0987-WWS
CITY OF MOBILE; STATE OF ALABAMA; CITY OF BIRMINGHAM, *Plaintiffs-Appellants*, vs. AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE, *Defendants-Appellees.*	No. 89-16519 DC # CV-88-0988-WWS

STATE OF ARIZONA, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16520 DC # CV-88-1009-WWS

STATE OF MARYLAND, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16521 DC # CV-88-2327-WWS

STATE OF WASHINGTON, COUNTY OF COWLITZ, *Plaintiffs-Appellants*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16522 DC # CV-88-2328-WWS
STATE OF NEW JERSEY, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16523 DC # CV-88-2329-WWS

STATE OF COLORADO,
Plaintiff-Appellant,

vs.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; et al.,
Defendants-Appellees.

No. 89-16524

DC #
CV-88-2330-WWS

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16525

DC #
CV-88-2331-WWS

STATE OF CONNECTICUT,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16526

DC #
CV-88-2332-WWS

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,
Defendants-Appellees.

No. 89-16527

DC #
CV-88-2333-WWS

STATE OF ALASKA, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16528 DC # CV-88-2334-WWS
STATE OF MONTANA; COUNTY OF TETON, *Plaintiffs-Appellants*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16529 DC # CV-88-2335-WWS

STATE OF MICHIGAN, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16530 DC # CV-88-2341-WWS
STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES and EUNICE, *Plaintiff-Appellant*, vs. HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al., *Defendants-Appellees.*	No. 89-16531 DC # CV-88-1131-WWS

Before: BEEZER, and NOONAN, *Circuit Judges*, SINGLETON,* *District Judge*.

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Beezer and Noonan have voted to reject the suggestion for rehearing en banc and Judge Singleton expresses no opinion regarding the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Filed: October 15, 1991

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumental titles of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964.)

15 U.S.C. § 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the State similarly situated, CITY OF LAFAYETTE, CITY AND COUNTY OF SAN FRANCISCO, AND COUNTY OF SAN BENITO,

Plaintiffs,

v.

HARTFORD FIRE INSURANCE COMPANY,
ALLSTATE INSURANCE COMPANY,
AETNA CASUALTY AND SURETY COMPANY,
CIGNA CORPORATION,
INSURANCE SERVICES OFFICE, INC.,
PETER N. MILLER,
ROBIN A.G. JACKSON,

COMPLAINT

CV-88-0981-WWS

ANTITRUST;
CLASS ACTION;
JURY DEMAND

MERRETT UNDERWRITING AGENCIES MGT., LTD.,
THREE QUAYS UNDERWRITING LTD.,
JANSON, GREEN, LTD.,
EDWARDS AND PAYNE MANAGEMENT (U.A.), LTD.,
C. J. WARRILOW-HINE & BUTCHER, LTD.,
J. BRIAN HOSE & OTHERS, LTD.,
HARVEY BOWRING, LTD. - MURRAY LAWRENCE & PARTNERS,
K.F. ALDER & OTHERS, (U.A.) LTD.,
D.P. MANN & OTHERS (U.A.) LTD.,
UNIONAMERICA INSURANCE CO., LTD.,
CNA RE (U.K.) LTD.,
TERRA NOVA INSURANCE CO., LTD.,
EXCESS INSURANCE GROUP, LTD.,
KEMPER REINSURANCE LONDON LTD.,
CONTINENTAL REINSURANCE CO. (U.K.) LTD.,
THOMAS A. GREENE & CO., INC.,
BALLANTYNE, MCKEAN & SULLIVAN, LTD.,
R.K. CARVILL & CO., LTD.,
GENERAL REINSURANCE CORPORATION,
CONSTITUTION REINSURANCE CORPORATION,
MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA,
PRUDENTIAL REINSURANCE COMPANY,
NORTH AMERICAN REINSURANCE CORPORATION,

WINTERTHUR SWISS INSURANCE COMPANY,
REINSURANCE ASSOCIATION OF AMERICA,

Defendants.

PRELIMINARY STATEMENT

The State of California by its Attorney General John K. Van De Kamp, brings this action on its own behalf and on behalf of counties, municipalities and other local governmental units in California which purchase commercial general liability ("CGL") insurance and have been injured by defendants' violations of federal and state antitrust laws. Defendants include major insurance and reinsurance firms and their trade associations whose illegal collusion resulted in severe restrictions in the availability and affordability of insurance coverage for businesses and governmental entities.

The first four claims for relief concern the manipulation of the standard policy forms for coverage of commercial general liability risks. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for the general liability insurance purchased by most insurance consumers. Anticonsumer revisions were made in the ISO CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. Insurance coverage for pollution was completely excluded from the ISO CGL policy forms. Insurance coverage for prior events was also eliminated in the new ISO CGL "claims-made" insurance form. Moreover, the defendants' conspiratorial and coercive conduct caused a severe market-wide constriction of CGL insurance coverage, such that this coverage was unavailable to many businesses and governmental entities.

The fifth claim alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form"

of ISO's CGL policy to coerce insurers into offering the "claims made" form which affords consumers of insurance services far less actual insurance coverage. The sixth and eighth claims allege that domestic and foreign reinsurers boycotted, and withheld reinsurance from the coverage of pollution risks. The seventh claim concerns the conspiracy between ISO and other defendants to standardize both "Umbrella" and Excess insurance forms. The ninth, tenth and eleventh claims concern violations of California state statutes as a result of these same acts.

Plaintiffs seek declaratory and injunctive relief, civil penalties and threefold the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26 for monetary and declaratory and injunctive relief for injuries caused by defendants' violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under California Business and Professions Code section 16700 et seq., commonly known as the Cartwright Act, California Insurance Code section 790, commonly known as the Unfair Insurance Trade Practices Act, and California Business and Professions code section 17200 et seq., commonly known as the Unfair Competition Act, are also stated herein, which this Court has jurisdiction over pursuant to principles of pendent jurisdiction.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 20) and 28 U.S.C. § 1391 because each of the defendants transacts business, has agents, resides or is found within the Northern District of California, and the claims alleged herein arose in the Northern District of California. Certain of the defendants are aliens as alleged below.

II

DEFINITIONS

4. As used in this complaint, the following terms are defined as:

a. "Commercial general liability" (CGL) insurance means insurance coverage for third party casualty damage claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

b. "Occurrence form" means a liability insurance form that covers losses, whenever claimed, that occur during the policy period, The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

c. "Claims-made form" means a CGL form under which the insured is liable only for those claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

d. "Dual form availability" means the availability of two standard CGL forms: an occurrence form and a claims-made form.

e. "Retroactive date" (Retro Date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified retroactive date.

f. "Defense within limits" (also referred to as "defense cost containment", "defense cost within policy limits"; "defense cost cap") means a CGL policy provi-

sion which includes the insurers' defense costs as part of the stated policy limits. CGL insurance policies have historically included an obligation for the insurer to pay the full legal costs of defending a claim without regard to policy limits.

g. "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all coverage for pollution exposures of plaintiffs herein.

h. "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

i. "Risk" means the hazard or type of potential accident for which insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

j. "Primary insurer" means an insurance company that sells insurance directly to consumers including businesses and governments.

k. "Insurance Services Office, Inc." or ISO is a not-for-profit corporation, with offices in San Francisco, California and New York, New York, which is a trade association for approximately 1,400 primary property/casualty insurance companies operating in the United States. One of ISO's functions is to develop standard policy forms and coverage parts for use by insurance companies.

l. "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

m. "1984 ISO CGL forms" means the two CGL forms filed lodged or with state regulators in March 1984: an occurrence form and a claims-made form.

n. "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators in 1986. These forms contained a complete pollution exclusion, and the claims-made form included a retroactive date.

o. "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company for a designated part of the insurance risks underwritten by the primary company.

p. "Treaty" means a contract by which a primary insurance company transfers to a reinsurer a portion of a category of risks which it will obligate itself to cover during the term of the treaty.

q. "Layer" or "layer of coverage" means a portion of risk taken on by either a primary insurer or reinsurer. Risks are layered in the sense that an insurer or reinsurer may have to respond only to claims above a certain amount but below another amount. For example, a reinsurer may have a contract or treaty to cover risk indemnification in excess of $1 million but less than $2 million. The primary insurer may retain the first million dollars in exposure, while other reinsurers may take on higher risk exposure layers, in this example layers above the $2 million level.

r. "Underwriting" means the act of assessing a risk and calculating a premium to be charged by a company or syndicate.

s. A "syndicate" is a group of individual investors associated with Lloyd's of London. Syndicates can act as both insurers and reinsurers. Each syndicate utilizes

the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

t. "Lloyd's of London" is a marketplace composed of syndicates and is located in London, England. Lloyd's provides North American consumers with both reinsurance and insurance. Approximately half of Lloyd's casualty business involves North American risks.

u. A "lead underwriter" negotiates the terms of a reinsurance treaty which his syndicate or company will cover. A broker will then arrange for other syndicates or companies to join the treaty on the same conditions as that negotiated by the lead underwriter.

v. "London Company Market" means a group of insurance firms located in London outside of Lloyd's. These firms provide coverages for insurance and reinsurance, often by following the lead of a Lloyds syndicate on the treaty in question.

w. "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims that are tendered by the reinsured primary company prior to a designated "sunset date." Thus a five-year sunset clause means than the primary insurer will have no reinsurance coverage for claims presented later that five years after the inception of the treaty.

III

PLAINTIFF

5. The State of California, by its Attorney General, John K. Van de Kamp, brings this action on its own behalf, on behalf of the class hereinafter described, and as *parens patriae* on behalf of the general welfare and economy of the State of California. City of Lafayette, City and County San Francisco, and City of San Benito are representative of public entities who compose the plaintiff class. The violations of

of federal and state law alleged herein have caused loss and damage and threaten continued loss and damage to the general welfare and economy of the State of California, as well as to individual members of the plaintiff class.

IV

CLASS ACTION ALLEGATIONS.

6. Plaintiffs bring this action for declaratory and injunctive relief as well as for damages, pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of itself and all members of a class comprised of all governmental entities within the State of California except entities and institutions of the United States government, that have purchased or sought to purchase CGL insurance from the defendants or their co-conspirators during the period of the conspiracy alleged herein. It also includes public entities which, unable to purchase CGL insurance due to the actions of the defendants or their co-conspirators herein, sought and obtained other form(s) of indemnity protection from whatever source, including self insurance.

7. Plaintiffs State of California, City of Lafayette, City and County of San Francisco, and County of San Benito are members of the class; their claims are typical of the claims of all class members; and they will fairly and adequately protect the interests of the class.

8. The class is so numerous that joinder of all members is impracticable. It consists of thousands of governmental entities in California as described above.

9. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Questions of law and fact common to the members of the class predominate over any questions affecting individual members. The common questions of fact and law include the existence of the combination

and conspiracies herein alleged, the extent to which members of the class were injured by the violation alleged, and the liability of defendants for the injury suffered by members of the class.

10. The claims of plaintiffs and other class members are identical, and the defenses will be identical with respect to each class member.

11. A class action is superior to any alternative method for the fair and efficient adjudication of this controversy.

V

DEFENDANTS

12. Defendants Merrett Underwriting Agencies (hereinafter "(U.A.)" Management, Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher Ltd., J. Brian Hose and Others, Ltd., Harvey Bowring, Ltd.-Murray Lawrence & Partners, K.F. Adler and Others (U.A.) Ltd., and D.P. Mann and Others (U.A.) Ltd., are underwriters for syndicates doing business through Lloyd's of London. These defendants contract for their syndicates to provide reinsurance and insurance on property and casualty risks throughout the United States, specifically including the Northern District of California.

13. Defendant Thomas A. Greene & Co., Inc. is a reinsurance broker with offices located in San Francisco and New York, which company provides brokerage services for the provision of reinsurance to insurance companies on risks throughout the United States, specifically including the Northern District of California.

14. Defendants Ballantyne, McKean and Sullivan, Ltd. and R.K. Carvill & Co., Ltd., are reinsurance brokers with offices in London, England, who arrange reinsurance coverages for U.S. insurance companies at Lloyd's and in the London Company market. These coverages concern risks located

throughout the United States, specifically including the Northern District of California.

15. Defendant Robin A.G. Jackson was, at all times relevant herein, chief underwriter for Merrett (U.A.) Mgt., Ltd.'s Non-Marine Syndicates. Jackson is a citizen of the United Kingdom and resident of London, England. As Chief Underwriter for Merrett, Jackson provided reinsurance and insurance for casualty and property risks throughout the United States, specifically including the Northern District of California.

16. Defendant Peter North Miller was, at all times relevant herein, the Chairman of the Council of Lloyd's of London, the governing body of Lloyd's. Miller is a citizen of the United Kingdom and a resident of London, England. Miller conducted relevant business of Lloyd's of London and of the Council of Lloyd's throughout the United States, particularly including personal conduct of such business in the Northern District of California.

17. Defendants Terra Nova Insurance Co., Ltd., Unionamerica Insurance Co., Ltd., CNA Re (U.K.) Ltd., Excess Insurance Group, Ltd., Kemper Reinsurance London Ltd. and Continental Reinsurance Co., (U.K.) Ltd. are underwriting companies within the London Company Market, which provide reinsurance for property and casualty risks throughout the United States, specifically including the Northern District of California.

18. Defendants General Reinsurance Corporation, Constitution Reinsurance Corporation, Prudential Reinsurance Company Mercantile, and General Reinsurance Corporation of America, and Northern American Reinsurance Corporation are United States corporations which provide reinsurance for risks throughout the United States, specifically including the Northern District of California.

19. Defendant Winterthur Swiss Insurance Company of Winterthur, Switzerland, provides reinsurance for risks

throughout the United States, specifically including the Northern District of California.

20. Defendants Allstate Insurance Company, the Hartford Fire Insurance Company, Aetna Casualty and Surety Company, and CIGNA Corporation are United States corporations which provide insurance for risks throughout the United States, specifically including the Northern District of California.

21. Defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers providing reinsurance on risks throughout the United States, specifically including the Northern District of California. The RAA's principal business consists of lobbying activity, and the RAA conducts such activity in the Northern District of California.

22. Defendant Insurance Services Office, Inc. (ISO) is a not-for-profit corporation with offices in San Francisco, California and New York, New York which develops rates and forms which are used by insurance companies in the sale of insurance throughout the United States, specifically including the Northern District of California.

VI

CO-CONSPIRATORS

23. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, not made defendants participated as co-conspirators with the defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VII

BACKGROUND: CGL INSURANCE, REINSURANCE, STATE REGULATION AND ISO

A. *CGL Insurance*

24. Commercial General Liability ("CGL") insurance protects the insured from claims brought against it by others. For example, CGL insurance covers an accident involving a customer which occurs on a business' premises. The insured is the purchaser or consumer of the CGL insurance and is also known as the "risk." CGL insurance is purchased by businesses, nonprofit groups and governmental entities such as cities or counties.

25. The basic insurance arrangement for CGL coverage is familiar. The contract between the insurance company and the insured is called a policy. The policy is written on a document known as a form. A policy is issued for a specific time period, *e.g.*, one or three years, known as the policy period. Under the terms of the policy, the insurer agrees to pay valid claims which are covered by the policy. The insurer also agrees to pay a lawyer to defend the lawsuit and to bear other costs of the defense. The price the company charges for the policy is called a premium.

B. *Reinsurance*

26. Reinsurance is insurance for insurance companies. Only insurance companies purchase reinsurance. For a premium the reinsurance company agrees to indemnify an insurance company for a portion of the risk originally assumed by the insurance company. The reinsurance company is known as the reinsurer and the insurance company is known as the primary or ceding company.

27. Reinsurance takes a variety of forms. The type of reinsurance most pertinent to this complaint is "treaty" reinsurance. Under a reinsurance treaty, the reinsurer agrees in advance with the reinsured to share a designated portion of

specified classes of risks assumed by the reinsured during the treaty period. The treaty period may be any length of time, but is normally one year.

28. Reinsurance treaties are often underwritten by a number of reinsurers, each reinsurer assuming a percentage of the treaty's obligations.

29. Reinsurance serves at least two different purposes. One is to protect the primary insurance company from catastrophic losses. The other is to allow the primary insurance company to sell more insurance than its own financial capacity might permit without the reinsurance.

30. The principal markets for the supply of reinsurance of North American CGL risks are in the United States, London, and the European continent. The most important part of this London market is Lloyd's of London.

31. Lloyd's of London (Lloyd's) is composed of syndicates. Syndicates are separately capitalized, independently operated, competing firms. Lloyd's itself is not an insurance company, but rather a marketplace or exchange where syndicates transact their business. A "Lloyd's of London" policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets in the United States.

32. Reinsurance is purchased by primary insurers either directly or through intermediary brokers. At Lloyd's all reinsurance must be procured through a Lloyd's broker, admitted to the floor at the Lloyd's market.

33. In reinsurance markets, certain underwriters or firms, known as "lead" underwriters, are recognized as having special expertise in certain classes and lines of risks. A lead underwriter is the first to sign the reinsurance treaty, and normally establishes with a primary company's broker, or intermediary, the terms, conditions and price of the treaty. "Following" underwriters only join onto a treaty after a recognized lead reinsurer has signed off on the treaty. Lead

underwriters therefore have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

34. The availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers. Prudent insurers rely heavily on reinsurance to protect their balance sheets from unexpected losses.

C. *State Regulation of Insurance*

35. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance. Pursuant to state law, only "admitted" or licensed insurers such as defendants Hartford, CIGNA, Aetna and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus lines." Surplus lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified by a special broker, the policy may be written by a non-admitted company known as a surplus lines insurer. These non-admitted company policies are not regulated by the state.

36. States also do not regulate umbrella and excess coverages as to either forms or rates. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies, and are used by insurance consumers to obtain higher levels of protection for other liability insurance they may purchase.

37. Unlike primary insurance companies, the business of reinsurance companies is not regulated by the states, with only certain limited exceptions concerning financial solvency.

D. *Insurance Services Office*

38. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1,400 property/casualty insurers including defendants Hartford, Allstate, CIGNA,

and Aetna. ISO was created in 1971 as a result of the merger of some eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the California Insurance Commissioner.

39. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates advisory premium rates and rules for CGL and certain other lines of insurance.

40. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA, and Aetna all played leadership roles in the development of ISO CGL forms.

41. CGL insurance written by primary insurers in the United States, including defendants Hartford, Allstate, Aetna and CIGNA, is predominately written on the ISO standard policy forms coverage parts.

42. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. The first is ISO's actuarial function. ISO maintains a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

43. For example with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premiums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

44. Applicable law in California, and other states also, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

45. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff class.

VIII

TRADE AND COMMERCE AFFECTED

46. The activities of the defendants and their co-conspirators and the restraints which are the subject of this complaint were and are within the flow of, and substantially affect, interstate commerce as more particularly described below.

47. During the period covered by this complaint the defendant insurance companies sold CGL insurance throughout California and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in California and throughout the United States.

48. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout California and the United States. Approximately one half of Lloyd's business covers North American risks. Income from U.S. CGL and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the U.S. and London.

49. During the period covered by this complaint, the sale of CGL insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL and property insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance and property insurance that was purchased by plaintiffs came from outside California;

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

50. The illegal conduct challenged herein has had and may be expected to continue to have a not insubstantial effect on interstate trade and commerce as described in this complaint.

IX

FACTS

A. *The 1973 ISO Occurrence Form*

51. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

52. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to

conditions" that occurred during the period the policy was in effect.

53. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

54. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, even if it cost $500,000 or even $1,000,000 in legal expenses to defend the claim.

55. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March, 1984.

B. *The 1984 ISO Forms*

56. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

57. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on when the accident or event itself *occurred* and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the *receipt* of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

58. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts

the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability for claims reported in the future by refusing insurance renewals to insureds who experience an increased or unexpected trend in claims.

59. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting off all coverage for occurrences prior to the retroactive date. Without a retroactive date an injury in 1976 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

60. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

61. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

62. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two CGL forms with state regulators in March, 1984.

C. *RAA's Response to the 1984 Forms*

63. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

64. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint strategy to force changes in the 1984 ISO CGL forms. At this meeting Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, "derail" the entire ISO CGL forms program.

65. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with Hartford, General Re Initiated a coordinated effort with the RAA to force revisions in the ISO CGL forms program. As part of their effort, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General, Constitution Re, North American Re and Winterthur Swiss.

66. At a June 15, 1984 meeting of the RAA "CGL Committee," defendants named in paragraph 65 agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form and a pollution exclusion and a defense cost cap were added to both forms.

67. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 CGL forms.

68. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to announce the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on

June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's of London's Response*

69. Defendants Hartford, Aetna, CIGNA and Allstate, in addition to conspiring with General Re and the RAA, also encouraged a boycott of the 1984 ISO CGL forms by key Lloyd's of London syndicates, including the lead underwriters for North American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 CGL forms and issue a more restrictive CGL form. These anti-consumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

70. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's of London syndicates, including defendants Merrett Syndicates, Edwards and Payne (U.A.) Ltd., and Three Quays Underwriting Management Ltd., their desire to restrict the ISO CGL coverage.

71. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicates, Ltd., a highly renowned lead underwriter in the North American casualty reinsurance market, was planning to withhold reinsurance from the market for primary companies using the new ISO forms.

72. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the March filed forms to the London market.

73. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.R. Carvill & Co. to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

74. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers including Tim Holloway of J. Brian Hose & Others Ltd. and Cyril Warrilow of J. Warrilow-Hine & Butcher, Ltd., threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

75. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the dinner were the leading Lloyd's Underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicates, Richard Hazell of Three Quays Syndicate, Charles Skey of the Edwards and Payne Syndicates and Gale Coles of the Janson, Greene Syndicate. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

76. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time the threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restriction revisions described in paragraphs 61 and 74.

77. Sometime between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded.

On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

78. As demanded on August 23rd by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never before had representatives of the domestic or foreign reinsurance markets been invited to speak at an ISO Executive Committee meeting.

79. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicates;

(f) Richard Hazell of Three Quays Ltd.; and

(g) Gale Coles of the Janson, Greene Syndicates.

ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

80. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re,

Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

81. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to Jackson before the meeting. Jackson conferred with at least Hazell and Coles before attending the meeting at ISO's headquarters in New York.

82. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

83. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would have been devastating for ISO members.

84. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed or lodged with state regulators in 1986.

85. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London

reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

86. Even after their victory at the ISO Executive Committee meeting on September 20, 1984, defendant Peter North Miller, defendant Lloyd's reinsurers, including Robin A.G. Jackson of the defendant Merrett Syndicates and Richard Hazell of defendant Three Quays Syndicates, defendants Janson Green, Ltd., Edwards and Payne Syndicates, Ballantyne, McKean & Sullivan, Ltd. and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

87. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

> (a) public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form; and
>
> (b) the redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause".

88. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to

the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made were left either without reinsurance coverage or with very low limits of coverage, even though the claims-made form itself had not yet been approved for use in many jurisdictions.

89. Representatives of Lloyd's including defendant Peter North Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form. In furtherance of this effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

90. A second stratagem employed by Lloyd's of London reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated reinsurance coverage for "long tail" risks written on the occurrence form.

91. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

92. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne, McKean and Sullivan, Ltd., combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

93. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution liability coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including California.

94. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to exclude all pollution liability coverage from "casualty" reinsurance treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicates, Three Quays Syndicates, Edwards and Payne Syndicates, C.J. Warrilow-Hine and Butcher, Ltd., Harvey Bowring-Murray Lawrence & Partners, K.F. Alder and Others, and D.P. Mann and Others. Participating London company market defendants included Unionamerica Insurance Co., CNA Re (U.K.) and Terra Nova Insurance Co.

95. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne, McKean and Sullivan, Ltd., those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

96. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers than had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide even "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal of Support For The 1973 CGL Forms*

97. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

98. In California there is no regulatory approval process for CGL forms and as such no approval was sought or obtained.

99. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions.

100. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

101. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford, Aetna and CIGNA, agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" refers to a layer of insurance, a higher level of indemnity protection, that sits on top of either a self-insurance program, often referred to as a "reten-

tion", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

102. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

103. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop standardized excess and umbrella policy forms for broad distribution.

104. Early drafts of the standardized policy language were written by defendant Allstate, co-conspirator Safeco, ISO staff members and others. Comments were solicited and received from defendants Merrett Syndicates, Three Quays Syndicates, co-conspirator H.S. Weavers Underwriting Agencies Ltd., (a leading London company market excess insurer) and others in the reinsurance and excess insurance markets.

105. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

a) a retroactive date in the claims-made version;

b) an absolute pollution exclusion in both versions; and

c) defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

106. Specialized reinsurers in London and the United States have also subsequently agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica Insurance Co., Ltd., Terra Nova Insurance

Co., Ltd., Excess Insurance Co., Ltd., Edwards and Payne Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett Syndicates, Ltd., Continental Re (U.K.) Ltd., and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including California.

107. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memorialized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. Retrocessional reinsurance means the reinsurance of the business written by reinsurers, while "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

108. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

109. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers of the LMX Market.

110. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

DOMESTIC CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, THE RAA AND MEMBERS OF THE RAA TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

111. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-68 above with the same force and effect as if here set forth in full.

112. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North America Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

113. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage or CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

114. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 112 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

115. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

SECOND CLAIM FOR RELIEF

FOREIGN CONSPIRACY

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS AND PRIMARY INSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

116. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-77 above with the same force and effect as if here set forth in full.

117. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt., Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., J. Brian Hose & Others, Ltd., R.K. Carvill & Co., Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

118. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

119. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 117 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the coverage terms and exclusions under which they would reinsure North American CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

120. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

THIRD CLAIM FOR RELIEF

JOINT CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

121. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-83 above with the same force and effect as if here set forth in full.

122. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt. Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., R.K. Carvill & Co. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

123. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' coverage terms and exclusions.

124. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 122 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks and jointly communicating those terms to the ISO Executive Committee on September 20, 1984;

(b) agreeing to boycott the proposed 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the terms agreed upon by defendants.

125. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased; and

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

FOURTH CLAIM FOR RELIEF

GLOBAL CONSPIRACY

(CONSPIRACY OF ISO, PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO STANDARDIZE THE TERMS AND CONDITIONS OF CGL INSURANCE COVERAGE)

126. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-85 above with the same force and effect as if here set forth in full.

127. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants ISO, Merrett (U.A.) Mgt., Ltd., Robin Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., R.K. Carvill Co., Ltd., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

128. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to eliminate pollution coverage from the 1984 ISO CGL forms, as had been demanded by the defendants named above,

(b) to eliminate retroactive coverage from the 1984 ISO CGL claims-made form;

(c) to agree to limit defense costs to the limits of the policy in any ISO CGL policy form.

129. For the purpose of forming and carrying out this contract, combination and conspiracy, the defendants named in paragraph 127 and co-conspirators did those things which they conspired to do, including, but not limited to:

(a) conducting meetings and discussions among themselves to agree on the terms to be included in the ISO CGL forms; and,

(b) agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO forms.

(c) agreeing to further revise the ISO CGL forms to provide for defense costs within limits, but agreeing to delay each revision until the changes in the retroactive date and pollution exclusion terms were introduced to the market and insurance regulators, where necessary.

130. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policies available in the State of California incorporate terms demanded by defendants, i.e. a pollution exclusion and a retroactive date;

(b) the price of pollution liability coverage and retroactive claims-made coverage, where it is available, has increased;

(c) competition in the markets for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(d) defense within limits is, or will be, a standard provision of CGL policies.

FIFTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S OF LONDON REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ON A CLAIMS-MADE BASIS

131. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-92 above with the same force and effect as if here set forth in full.

132. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter North Miller, Robin A.G. Jackson, Merrett (U.A). Mgt., Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.) Ltd., Ballantyne, McKean and Sullivan, Ltd. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks written on the occurrence form and the market for primary coverage of CGL risks on the occurrence form.

133. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) to refuse to reinsure those CGL risks written on an occurrence form; and

(c) to eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

134. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 132 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis; and

(c) coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and/or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims-made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

135. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the market for occurrence CGL coverage available in the State of California was unreasonably restrained;

(b) occurrence CGL coverage became unavailable in the State of California for many risks, including municipal general liability risks;

(c) the price of occurrence liability coverage, where it is available, has been increased.

SIXTH CLAIM FOR RELIEF

POLLUTION BOYCOTT I

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS, BROKERS AND LONDON COMPANY REINSURERS TO BOYCOTT POLLUTION COVERAGE)

136. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-100 above with the same force and effect as if here set forth in full.

137. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett (U.A.) Mgt., Ltd., Harvey Bowring, Ltd.-Murray Lawrence & Partners; K.F. Alder and Others (U.A.), Ltd., Edwards and Payne (U.A.), Ltd., D.P. Mann and Others (U.A.) Ltd., C.J.Warrilow-Hine and Butcher, Ltd., Unionamerica Insurance Company, Ltd., Terra Nova Insurance Co., Ltd., CNA Re (U.K.) Ltd., and Ballantyne, McKean and Sullivan, Ltd., and other co-conspirators, have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

138. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict terms under which casualty reinsurance coverage would be provided for CGL risks;

(b) to limit the availability of pollution coverage in U.S. primary casualty insurance.

139. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 137 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks;

(b) agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

140. This contract, combination and conspiracy has had the following effects, among others:

(a) pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California;

(b) the price paid by plaintiffs for pollution liability insurance coverage, where it is available, has dramatically increased; and

(c) competition in the market for pollution liability coverage has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

(CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS)

141. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-105 above with the same force and effect as if here set forth in full.

142. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, Merrett (U.A.) Mgt., Ltd. and Three Quays Underwriting Management Ltd., and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

143. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert

of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

144. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 142 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "Model" forms and policy language for both umbrella and excess insurance coverages;

(b) Agreeing upon, drafting, and then promulgating such "Model" forms and policy language for use in the umbrella and excess insurance markets.

145. This aforesaid contract, combination and conspiracy has had the following effect, among others:

(a) Competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

EIGHTH CLAIM FOR RELIEF

POLLUTION BOYCOTT II

(LLOYD'S OF LONDON, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES)

146. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-110 above with the same force and effect as if here set forth in full.

147. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Excess Insurance

Group Ltd., R.A. Edwards Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett (U.A.) Management Ltd., Continental Reinsurance Co. (U.K.) Ltd., and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of California.

148. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks;

(b) to limit the availability of property insurance and reinsurance for North American risks.

149. For the purposes of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 147 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance;

(b) agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause;

150. This contract, combination and conspiracy has had the following effect, among others:

(a) property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of California, now exclude a seepage, pollution and contamination clause;

(b) the prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased;

(c) competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

NINTH CLAIM FOR RELIEF

STATE LAW CLAIM I

(VIOLATIONS OF THE CARTWRIGHT ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 16700 ET SEQ.)

151. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

152. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerce are in violation of California Business and Professions Code section 16720 et seq., commonly known as the Cartwright Act.

TENTH CLAIM FOR RELIEF

STATE LAW CLAIM II

(VIOLATIONS OF THE UNFAIR INSURANCE TRADE PRACTICES ACT, CALIFORNIA INSURANCE CODE § 790 ET SEQ.)

153. Plaintiffs repeat and reallege every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

154. The aforesaid agreements, combinations and conspiracies in unreasonable restraint of trade and commerce are in violation of California Insurance Code section 790 et seq., commonly known as the Unfair Insurance Trade Practices Act.

ELEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM III

(VIOLATIONS OF THE UNFAIR COMPETITION ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 ET SEQ.)

155. Plaintiffs repeat and realleges each and every allegation contained in paragraphs 1-154 above with the same force and effect as if here set forth in full.

156. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerance and said violations of federal and state law are violations of California Business and Professions Code section 17200 et seq., commonly known as the Unfair Competition Act.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for judgment as follows:

157. The court adjudge and decree that defendants and coconspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), California Business and Professions Code section 16700 et seq., California Insurance Code section 790 et seq., and California Business and Professions Code section 17200 et seq.

158. Defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf, be enjoined from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations and conspira-

cies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

159. Defendant ISO and its member companies and their staffs be enjoined from communicating directly outside the formal auspices of ISO, or other authorized rating bureau under applicable state law, concerning (a) rates, (b) standard policy form language, (c) choice of policy forms, or (d) terms and conditions of insurance, for any line, class or risk.

160. Defendant ISO and its directors, officers, employees, agents, and any other persons purporting to act on its behalf be enjoined from holding any meeting at the same time and location, or in coordination with, the meeting of any other trade association or group in the insurance industry.

161. Defendant ISO be enjoined to maintain accurate records of all attendees at every meeting of its Board, Executive Committee, or other committee or subcommittee meetings convened under the auspices of ISO, and to tape record each such meeting, including meetings held by conference call, and to maintain such tape(s) for a period of at least five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Section of the Attorney General of plaintiff State of California.

162. Defendant ISO be enjoined to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of ISO, or acting in a capacity reasonably likely to be taken to be on behalf of ISO.

163. Defendant ISO be enjoined to issue forms or form coverage parts which include all of the elements of the original March 1984 CGL forms, as thereafter lawfully amended to include the following terms:

a. an automatic 60 day "mini-tail" for reporting claims:

b. Limitations upon an insurer's total freedom to advance the policy's retroactive date;

c. an automatic five year tail for occurrences notified to insurer but not yet claimed;

d. an advisory endorsement to reinstate a policy's aggregate limits if any unlimited reporting "tail" is separately purchased;

e. a requirement that the insurer notify the insured of his right to purchase an unlimited reporting "tail" whenever the retroactive date of the policy is advanced;

f. Limitations on the amount of detail required in the notice from the insured to the insurer which is required to activate the automatic 5-year "tail".

164. Enjoin defendant ISO to maintain statistical and rating support for the 1973 CGL form and for the 1984 CGL form as provided in the preceding paragraph.

165. Enjoin defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

166. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from participating on any board or committee of ISO for five years.

167. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from making any public announcements urging, recommending, or announcing product restrictions, pricing behavior, or changes in loss reserves.

168. Enjoin defendant ISO to maintain on its Board of Directors public-interest members as appointed by the Court, which public-interest members shall constitute a majority of the Board of Directors, and who shall be provided adequate compensation and support to participate effectively in the business of the Board of Directors.

169. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

170. Enjoin each defendant reinsurer and each member company of the defendant RAA from communicating directly or indirectly with any other reinsurer, save in a public announcement made in the legitimate press/media, that it is considering withdrawing or forebearing from reinsuring any primary insurer, or any line of insurance.

171. Enjoin each defendant reinsurer, defendant RAA, and its member companies from establishing any formal or informal committees or other groups of competing reinsurers, or from communicating among themselves, for purposes that include or contemplate any activity regarding any forms, coverage parts, rates, terms or conditions upon which primary insurers or reinsurers provide coverage for CGL risks.

172. Enjoin each and every defendant reinsurer specified in paragraphs 1-110, and all members of the RAA, from communicating directly or indirectly outside a formal meeting of the RAA, or other legitimate trade organization, concerning rates, pricing, forms or other terms of insurance or reinsurance.

173. Enjoin defendant RAA to maintain accurate records of all attendees at every meeting of every Board, Executive Committee, or other committee or subcommittee convened under the auspices of RAA and to tape record each such meeting, including meetings held by conference call, and maintain all such tapes(s) for a period of not less than five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Division of the Attorney General of plaintiff State of California.

174. Enjoin each defendant Lloyd's of London Underwriter and London Company Market Underwriter and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of

business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the court and the Attorney General of the plaintiff State of California.

175. Enjoin defendant General Re from participating in any Board or committee of the RAA for five years.

176. Enjoin defendants Thomas A. Greene and Co., R.K. Carvill Co., Ltd. and Ballantyne, McKean and Sullivan Ltd., from providing information to any reinsurer on the prices, terms, or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

177. Enjoin each and every defendant engaged in the sale of insurance to consumers to divest itself of any and all reinsurance and brokerage affiliates, subsidiaries, or other operations, and enjoin said defendant from engaging in such operations in the future without leave of court.

178. Enjoin each and every defendant operating as an admitted carrier in plaintiff State of California to divest itself of any and all surplus lines and nonadmitted affiliates, subsidiaries, or other operations, and enjoin said defendant from engaging in such operations in the future without leave of court.

179. Enjoin each and every defendant operating as a reinsurer to divest itself of any and all intermediary brokerage affiliates, subsidiaries, or other operations and enjoin said defendant from engaging in such operations in the future without leave of court.

180. Enjoin each and every defendant insurer and reinsurer from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

181. Enjoin all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be

approved by the court and to report on an annual basis for 10 years to the court and plaintiff's counsel with regard to compliance efforts pursuant thereto.

182. Enjoin each and every defendant to establish and maintain a fund for the benefit of plaintiffs who have incurred injury for claims for which said plaintiffs would have had CGL coverage but for defendants' violations of law.

183. Plaintiffs be awarded three times the damages incurred by them as a consequence of the aforesaid conspiracies and combinations, as determined by the Court.

184. That each defendant be ordered to pay plaintiff civil penalties in an amount to be determined by the court, in accordance with California Business and Professions Code Section 17206.

185. Plaintiffs have such other and further relief as the nature of the case may require and the court may deem just and proper.

186. Plaintiffs recover the costs of, and attorneys fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiffs demand trial by jury for all of the issues pled herein so triable.

DATED: March 22, 1988

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CONNECTICUT, on behalf of itself and all municipalities, school districts, and other political subdivisions within the State,

Plaintiff,

v.

HARTFORD FIRE INSURANCE COMPANY,
ALLSTATE INSURANCE COMPANY,
AETNA CASUALTY AND SURETY COMPANY,
CIGNA CORPORATION,
INSURANCE SERVICES OFFICE, INC.
PETER N. MILLER,
ROBIN A.G. JACKSON,
MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED,
THREE QUAYS UNDERWRITING MANAGEMENT LIMITED,

COMPLAINT

CV-88-2332-WWS

ANTITRUST
JURY DEMAND

JANSON GREENE MANAGEMENT LIMITED,
EDWARDS & PAYNE (Underwriting Agencies) LIMITED,
C.J.W. (Underwriting Agencies) LIMITED,
MURRAY LAWRENCE & PARTNERS,
OXFORD SYNDICATE MANAGEMENT LIMITED,
D.P. MANN UNDERWRITING AGENCY LIMITED,
UNIONAMERICA INSURANCE CO., LTD.,
CNA RE (U.K.) LTD.,
TERRA NOVA INSURANCE CO., LTD.,
EXCESS INSURANCE COMPANY LIMITED,
KEMPER RE (U.K.) LTD.,
CONTINENTAL REINSURANCE CO. (U.K.) LTD.,
THOMAS A. GREENE & CO., INC.,
BALLANTYNE, MCKEAN & SULLIVAN, LTD.,
R.K. CARVILL & CO., LTD.
REINSURANCE ASSOCIATION OF AMERICA,
GENERAL REINSURANCE CORPORATION,
CONSTITUTION REINSURANCE CORPORATION,
MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA,
PRUDENTIAL REINSURANCE COMPANY,

NORTH AMERICAN REINSURANCE CORPORATION,
WINTERTHUR SWISS INSURANCE COMPANY,

Defendants.

PRELIMINARY STATEMENT

The State of Connecticut, by its Attorney General, Joseph I. Lieberman, brings this action on its own behalf, as *parens patriae* on behalf of the general welfare and economy of the state, and on behalf of all municipalities, school districts and other political subdivisions which have been injured by defendants' violations of federal and state antitrust laws.

Defendants include major insurance and reinsurance firms and their trade associations. The defendants' illegal collusion resulted in severe restrictions in the availability and affordability of CGL property/casualty insurance coverage for governmental entities and businesses.

The first claim for relief concerns all of the activities of the defendants herein. The remaining claims for relief, alternatively concern specific activities of particular defendants as hereinafter described. The second claim for relief concerns the manipulation of the standard policy forms relating to Commercial General Liability ("CGL") insurance coverage. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for CGL, which is the general liability insurance purchased by most insurance consumers. Anti-consumer revisions were made in ISO's CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. For example, insurance coverage for pollution was completely excluded from ISO's CGL policy forms. Additionally, insurance coverage for prior events was eliminated in ISO's new CGL "claims-made" insurance form. Defendants' conspiratorial and coercive con-

duct caused a severe market-wide constriction of CGL insurance coverage.

The third claim for relief alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form" of ISO's CGL policy. Defendants allegedly did so in order to coerce insurers into offering the "claims made" form which provides consumers of insurance services far less actual insurance coverage. The fourth and fifth claims allege that domestic and foreign reinsurers boycotted and withheld reinsurance from the coverage of pollution risks. The sixth claim concerns the conspiracy between ISO and other defendants to standardize both "umbrella" and "excess" insurance forms. The seventh claim alleges corresponding violations of Connecticut state antitrust law as a result of all of the foregoing acts.

Plaintiff seeks declaratory relief, injunctive relief, civil penalties, and three times the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I.

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26. Plaintiff seeks monetary, declaratory and injunctive relief for injuries caused by defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-24, *et seq.* are also stated herein. This Court has pendent jurisdiction over such claims.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391. Each of the defendants transacts business, has agents, resides or is found within the Northern District of California. Certain of the defendants are aliens, as alleged below.

II.

DEFINITIONS

4. As used in the complaint, the following terms are defined as:

(a) "Claims-made form" means a CGL form under which the insurer is liable only for claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

(b) "Commercial general liability (CGL) insurance" means insurance coverage for third party damage (*i.e.*, "casualty") claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

(c) "Defense within limits" (also referred to as "defense cost containment"; "defense cost within policy limits"; "defense cost cap") means a CGL policy provision which includes the insurer's defense costs as part of the stated policy limits. CGL insurance policies historically have included an obligation on the part of the insurer to pay the full legal costs of defending a claim without regard to policy limits.

(d) "Dual form availability" mean the availability of two standard CGL forms: an occurrence form and a claims-made form.

(e) "Insurance Services Office, Inc. (ISO)," is a not-for-profit corporation with offices throughout the country, including one in San Francisco, California. ISO is headquarted in New York, New York. It is a trade association for approximately 1,400 primary property/casualty insurance companies operating in the United

States, including defendants Hartford, Allstate, Aetna and CIGNA. One of ISO's functions is to develop standard policy forms for use by insurance companies.

(f) "Layer" or "layer of coverage" means a portion of risk assumed by either a primary insurer or a reinsurer. Risks are layered to the extent that an insurer or reinsurer may be responsible only for claims above a certain amount but below another amount. For example, a reinsurer may agree to indemnify a primary insurer for claims paid by the latter in excess of $1 million but less that $2 million. The primary insurer may "retain" the first million dollars in exposure, while other reinsurers may cover higher risk exposure layers, such as those above the $2 million level.

(g) A "lead underwriter" is an underwriter recognized as having special expertise in certain classes and lines of risks. Ordinarily, he negotiates (with a primary insurer's broker, or intermediary) the terms, conditions and price of a reinsurance treaty which his syndicate or company will cover. The lead underwriter then is the first to sign the treaty. Thereafter, a broker arranges for other ("following") syndicates or companies to join the treaty on the same terms and conditions as those negotiated by the lead underwriter. Accordingly, lead underwriters have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

(h) "Lloyd's of London" (Lloyd's) is an insurance marketplace or exchange in London, England, where syndicates transact their business. Lloyd's syndicates compete for business both within the Lloyd's marketplace and in the world-wide insurance and reinsurance markets. A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets, in the United States. Approximately half of Lloyd's casualty business involves North American risks.

At Lloyd's, all reinsurance must be procured through a broker admitted to the floor at the Lloyd's market.

(i) "London Company Market" means a group of insurance firms which are located in London but are not a part of the Lloyd's marketplace. These firms provide insurance and reinsurance coverage often by following the lead of a Lloyd's syndicate.

(j) "1984 ISO CGL forms" means the two CGL forms (an occurrence form and a claims-made form) filed by ISO with state regulators beginning in March 1984.

(k) "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators for use in 1986, which forms contained a complete pollution exclusion, and as to the claims-made form included a retroactive date.

(l) "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

(m) "Occurrence form" means a liability insurance form that covers injuries or losses, whenever claimed, that occur during the policy period. The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

(n) "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all pollution coverage.

(o) "Primary insurer" means an insurance company that sells insurance directly to consumers, including governments and businesses.

(p) "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insur-

ance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(q) "Retroactive date" (retro date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified date.

(r) "Retrocessional reinsurance" means insurance for reinsurers.

(s) "Risk" means the hazard or type of potential accident for which the insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

(t) "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims tendered to it by the primary insurer prior to the designated "sunset date." Thus a five year sunset clause means that the primary insurer will have no reinsurance coverage for claims it presents to the reinsurer later than five years from the inception of the treaty. Use of a sunset clause deprives primary insurers of reinsurance for long tail exposure beyond the sunset date.

(u) A "syndicate" is a group of individual investors associated with Lloyd's. Syndicates are separately owned and capitalized, independently operated, competing firms. Syndicates can act both as insurers and reinsurers. Each syndicate utilizes the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

(v) "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

(w) "Treaty" means a contract by which a primary insurer transfers to one or more reinsurers a portion of a specified category of risks which the primary insurer will assume (*i.e.*, obligate itself to cover) during the term of the treaty.

(x) "Underwriting" means assessing and assuming a risk, and calculating a premium to be charged for assuming that risk.

III.

PLAINTIFF

5. Plaintiff, State of Connecticut, is one of the sovereign states of the United States of America. By virtue of his authority as contained in Sections 35-32 and 35-44a of the Connecticut General Statutes, Joseph I. Lieberman, the Attorney General of the State of Connecticut, brings this action on behalf of the State of Connecticut and all of its municipalities, school districts and other political subdivisions for monetary and injunctive relief under the antitrust laws of the United States and the State of Connecticut. The violations of federal and state law alleged herein have caused loss and damage, and threaten continued loss and damage, to the State, to the general welfare and economy of the State, and to the parties on whose behalf this action is brought.

IV.

DEFENDANTS

A. *Primary Insurers*

6. Hartford Fire Insurance Company ("Hartford") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Hartford is made a defendant herein as to claims 1, 2, 6 and 7.

7. Allstate Insurance Company ("Allstate") is an Illinois corporation with its principal place of business in Northbrook, Illinois. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Allstate is made a defendant herein as to claims 1, 2, 6 and 7.

8. Aetna Casualty and Surety Company ("Aetna") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Aetna is made a defendant herein as to claims 1, 2, 6 and 7.

9. CIGNA Corporation ("CIGNA") is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. CIGNA, or its subsidiaries, are licensed to sell, and did sell, CGL insurance in California and Connecticut. CIGNA is made a defendant herein as to claims 1, 2, 6 and 7.

B. *Trade Associations*

10. Insurance Services Office, Inc. ("ISO") is a Delaware non-profit corporation with its principal place of business in New York, New York. ISO operates throughout the United States and has an office in San Francisco, California. It is an authorized insurance rating service organization in California and Connecticut. ISO is made a defendant herein as to claims 1, 2, 6 and 7.

11. Reinsurance Association of America ("RAA") is a trade association of domestic reinsurers with its principal

place of business in Washington, D.C. RAA is comprised of reinsurers who transact business in California and Connecticut, and lobbies on their behalf in California. RAA is made a defendant herein as to claims 1, 2 and 7.

C. *Domestic Reinsurers*

12. General Reinsurance Corporation ("General Re") is a Delaware corporation with its principal place of business in Stamford, Connecticut. It provides reinsurance for insurers and risks located in California and Connecticut. General Re is made a defendant herein as to claims 1, 2 and 7.

13. Constitution Reinsurance Corporation ("Constitution Re") is part of a wholly-owned subsidiary of Xerox Financial Services, a Delaware corporation. Its principal place of business is in New York, New York and it provides reinsurance for insurers and risks located in California and Connecticut. Constitution Re is made a defendant herein as to claims 1, 2 and 7.

14. Mercantile and General Reinsurance Company of America ("Mercantile and General Re") is a New York corporation with its principal place of business in Morristown, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Mercantile and General Re is made a defendant herein as to claims 1, 2 and 7.

15. Prudential Reinsurance Company ("Prudential Re") is a Delaware corporation with its principal place of business in Newark, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Prudential Re is made a defendant herein as to claims 1, 2 and 7.

16. North American Reinsurance Corporation ("North American Re") is a New York corporation with its principal place of business in New York, New York. It provides reinsurance for insurers and risks located in California and Connecticut. North American Re is made a defendant herein as to claims 1, 2 and 7.

17. Winterthur Swiss Insurance Company ("Winterthur Swiss") is a Swiss limited liability company with its principal office in Winterthur, Switzerland. It provides insurance and reinsurance for insurers and risks located in California and Connecticut. Winterthur Swiss is made a defendant herein as to claims 1, 2 and 7.

D. *Lloyd's of London Syndicates*

18. Robin A.G. Jackson was, at all times relevant herein, the underwriter for defendant Merrett Syndicate. As the agent for Merrett Syndicate, Robin A.G. Jackson provided insurance and reinsurance for insurers and risks located in California and Connecticut. Robin A.G. Jackson is made a defendant herein as to claims 1, 2, 3 and 7.

19. Merrett Underwriting Agency Management Limited ("Merrett Syndicate"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Merrett Syndicate provides insurance and reinsurance for insurers and risks located in California and Connecticut. Merrett Syndicate is made a defendant herein as to claims 1, 2, 3, 4, 5, 6 and 7.

20. Three Quays Underwriting Management Limited ("Three Quays"), is an unincorporated association of individuals with its principal place of business at Lloyd's. The chief underwriter for Three Quays is Richard Hazell. Three Quays provides insurance and reinsurance for insurers and risks located in California and Connecticut. Three Quays is made a defendant herein as to claims 1, 2, 3, 6 and 7.

21. Janson Greene Management Limited ("Janson Greene"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Janson Greene provides insurance and reinsurance for insurers and risks located in California and Connecticut. Janson Greene is made a defendant herein as to claims 1, 2, 3 and 7.

22. Edwards & Payne (Underwriting Agencies) Limited ("Edwards & Payne"), is an unincorporated association of

individuals with its principal place of business at Lloyd's. Edwards & Payne provides insurance and reinsurance for insurers and risks located in California and Connecticut. Edwards & Payne is made a defendant herein as to claims 1, 2, 3, 4, 5 and 7.

23. C.J.W. (Underwriting Agencies) Limited ("C.J.W.") is an unincorporated association of individuals with its principal place of business at Lloyd's. C.J.W. provides insurance and reinsurance for insurers and risks located in California and Connecticut. C.J.W., is made a defendant herein as to claims 1, 2, 4 and 7.

24. Murray Lawrence & Partners ("Murray Lawrence"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Murray Lawrence provides insurance and reinsurance for insurers and risks located in California and Connecticut. Murray Lawrence is made a defendant herein as to claims 1, 4 and 7.

25. Oxford Syndicate Management Limited ("Oxford") is an unincorporated association of individuals with its principal place of business at Lloyd's. Oxford provides insurance and reinsurance for insurers and risks located in California and Connecticut. Oxford is made a defendant herein as to claims 1, 4, 5 and 7.

26. D.P. Mann Underwriting Agency Limited ("D.P. Mann"), is an unincorporated association of individuals with its principal place of business at Lloyd's. D.P. Mann provides insurance and reinsurance for insurers and risks located in California and Connecticut. D.P. Mann is made a defendant herein as to claims 1, 4 and 7.

27. Peter N. Miller was Chairman of Lloyd's during the period covered by this complaint. Miller is made a defendant herein as to claims 1, 3 and 7.

E. *London Company Market Reinsurers*

28. Unionamerica Insurance Co., Ltd. ("Unionamerica"), is a limited liability company with its principal place of busi-

ness in London. Unionamerica provides insurance and reinsurance for insurers and risks located in California and Connecticut. Unionamerica is made a defendant herein as to claims 1, 4, 5 and 7.

29. CNA Re (U.K.), Ltd. ("CNA Re"), is a limited liability company with its principal place of business in London. CNA Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. CNA Re is made a defendant herein as to claims 1, 4 and 7.

30. Terra Nova Insurance Co., Ltd. ("Terra Nova"), is a limited liability company with its principal place of business in London. Terra Nova provides insurance and reinsurance for insurers and risks located in California and Connecticut. Terra Nova is made a defendant herein as to claims 1, 4, 5 and 7.

31. Excess Insurance Company Limited ("Excess"), is a limited liability company with its principal place of business in London. Excess provides insurance and reinsurance for insurers and risks located in California and Connecticut. Excess is made a defendant herein as to claims 1, 5 and 7.

32. Kemper Re (U.K.) Ltd. ("Kemper Re"), is a limited liability company with its principal place of business in London. Kemper Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. Kemper Re is made a defendant herein as to claims 1, 5 and 7.

33. Continental Reinsurance Co. (U.K.), Ltd. ("Continental Re"), is a limited liability company with its principal place of business in London. Continental Re provides reinsurance for insurers and risks located in California and Connecticut. Continental Re is made a defendant herein as to claims 1, 5 and 7.

F. *Brokers*

34. Thomas A. Greene & Co., Inc. ("Thomas A. Greene"), is a New York corporation with its principal place

of business in New York, New York, and offices in San Francisco, California. It acts as an intermediary broker for primary insurance companies doing business in California and Connecticut. Thomas A. Greene is made a defendant herein as to claims 1, 2 and 7.

35. Ballantyne, McKean & Sullivan, Ltd. ("Ballantyne McKean"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places insurance for insureds and reinsurance for primary insurance companies for risks located in California and Connecticut. Ballantyne McKean is made a defendant herein as to claims 1, 3, 4 and 7.

36. R.K. Carvill & Co. ("R.K. Carvill"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places reinsurance for primary insurance companies doing business in California and Connecticut. R.K. Carvill is made a defendant herein as to claims 1, 2 and 7.

V.

CO-CONSPIRATORS

37. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, are not made defendants herein but participated as co-conspirators with defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VI.

TRADE AND COMMERCE AFFECTED

38. The activities of the defendants and their co-conspirators, and the restraints which are the subject of this complaint, were and are within the flow of, and substantially affect, interstate commerce, as more particularly described below.

39. During the period covered by this complaint the defendant primary insurance companies sold CGL insurance throughout Connecticut and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in Connecticut and throughout the United States.

40. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout Connecticut and the United States. Approximately one-half of Lloyd's business covers North American risks. Income from United States CGL reinsurance and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the United States and London.

41. During the period covered by this Complaint, the sale of CGL property/casualty insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL property/casualty insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance that was purchased by plaintiff, and the parties upon whose behalf this action is brought, came from outside Connecticut;

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States, including the State of Connecticut;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

42. The illegal conduct challenged herein has had, and may be expected to continue to have, a not insubstantial effect on the above-described interstate trade and commerce.

VII.

BACKGROUND: STATE REGULATION AND ISO

A. *State Regulation of Insurance*

43. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance.

44. Pursuant to state law, only "admitted," or licensed, insurers such as defendants Hartford, CIGNA, Aetna and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus" or "excess" lines. Surplus or excess lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified, the policy may be written by a non-admitted company known as a surplus or excess lines insurer. These surplus or excess lines are not regulated by the states.

45. Umbrella and excess coverage provides insurance consumers with higher levels of protection above other liability insurance they may purchase. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies. States also do not regulate umbrella and excess coverage offered by non-admitted insurance companies.

46. Reinsurance transactions are not subject to state insurance regulation.

B. *ISO and the Market Dominance of ISO Forms*

47. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1400 property/casualty insurers including defendants Hartford, Allstate, CIGNA, and Aetna. ISO was created in 1971 as a result of the merger of eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the Connecticut Insurance Commission.

48. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates advisory premium rates and rules for CGL and certain other lines of insurance.

49. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA and Aetna all played leadership roles in the development of ISO CGL forms.

50. CGL insurance written by primary insurers in the United States, including that written by defendants Hartford, Allstate, CIGNA and Aetna, is predominately written on the ISO standard policy forms and coverage parts.

51. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. One of ISO's key functions is its actuarial operations of maintaining a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

52. For example, with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premi-

ums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

53. Applicable law in Connecticut, and other states, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

54. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff and the parties on whose behalf this action was brought.

VIII.

FACTS

A. *The 1973 ISO Occurrence Form*

55. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

56. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to conditions" that occurred during the period the policy was in effect.

57. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

58. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, and would not be reduced by the cost of defending against the claim.

59. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March 1984.

B. *The 1984 ISO Forms*

60. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

61. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on when the accident or event itself occurred and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the receipt of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

62. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability to claims reported in the future by refusing insurance renewals to insureds who experience any increased or unexpected trend in claims.

63. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting off all coverage for occurrences prior to the retroactive date. Without a retroactive date, an injury in 1983 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

64. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

65. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

66. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two new CGL forms with state regulators beginning in March 1984.

C. *RAA's Response to the 1984 Forms*

67. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

68. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint

strategy to force changes in the 1984 ISO CGL forms. At this meeting, Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, to "derail" the entire ISO CGL forms program.

69. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with Hartford, General Re initiated a coordinated effort with the RAA to force revisions in the ISO CGL forms program. On April 18, 1984, RAA and certain of its members were informed by ISO staff that changes in the 1984 ISO CGL form would not be made. In response, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General Re, Constitution Re, North American Re and Winterthur Swiss.

70. At a June 15, 1984 meeting of the RAA CGL Committee, its members agreed to boycott the 1984 ISO CGL forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms.

71. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 ISO CGL forms. Before it was sent, each of the members of the RAA CGL Committee approved the wording of the letter. Prudential Re approved the substance of the letter.

72. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to convey the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's Response*

73. Defendants Hartford, Allstate, CIGNA and Aetna also encouraged a boycott of the 1984 ISO CGL forms by key Lloyd's syndicates, including the lead underwriters for North

American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 ISO CGL forms and issue a more restrictive CGL form. These anti-consumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

74. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's syndicates, including defendants Merrett Syndicate, Edwards & Payne, and Three Quays, their desire to restrict the ISO CGL coverage.

75. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicate, a highly influential lead underwriter in the North American casualty reinsurance market, was threatening to withhold reinsurance from the market for primary companies using the new ISO forms.

76. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the 1984 ISO CGL forms to the London market.

77. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.K. Carvill to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

78. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

79. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the dinner were the leading Lloyd's underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicate, Richard Hazell of Three Quays, Charles Skey of Edwards & Payne, and Gale Coles of Janson Greene. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

80. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restrictions previously described.

81. Some time between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded. On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

82. As demanded on August 23, 1984 by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never

before had representatives of the domestic or foreign reinsurance markets been invited to speak at an ISO Executive Committee meeting.

83. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicate;

(f) Richard Hazell of Three Quays; and

(g) Gale Coles of Janson Greene. ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

84. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re, Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

85. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to Jackson before the meeting. Jackson conferred with at least Hazell

and Coles before attending the meeting at ISO's headquarters in New York.

86. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

87. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would have been devastating for ISO members.

88. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed or lodged with state regulators in 1986.

89. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

90. Even after their success at the ISO Executive Committee meeting on September 20, 1984, defendant Peter N. Miller, defendant Lloyd's reinsurers, including Robin A.G. Jackson of the defendant Merrett Syndicate and Richard Hazell of defendant Three Quays, defendants Jason Green, Edwards & Payne, Ballantyne McKean and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

91. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

(a) Public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form; and

(b) The redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause."

92. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for, or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made would be left either without reinsurance coverage or with very low limits of coverage, even though the claims-made form itself had not yet been approved for use in many jurisdictions.

93. Representatives of Lloyd's including defendant Peter N. Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's was withdrawing entirely from the business of reinsuring pri-

mary U.S. insurers who wrote on the occurrence form. In furtherance of this effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

94. A second stratagem employed by Lloyd's reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated reinsurance coverage for "long tail" risks written on the occurrence form.

95. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

96. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne McKean, combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

97. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution liability coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including Connecticut.

98. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to exclude all pollution liability coverage from "casualty" reinsurance

treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicate, Three Quays, Edwards & Payne, C.J.W., Murray Lawrence, Oxford, and D.P. Mann. Participating London company market defendants included Unionamerica, CNA Re and Terra Nova.

99. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne McKean, those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

100. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers than had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal of Support For The 1973 CGL Forms*

101. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

102. In Connecticut, the 1986 ISO CGL forms were originally filed with the Connecticut Insurance Commissioner on December 5, 1984, and affirmatively approved by said Commissioner for use in Connecticut in February, 1986.

103. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and

expensive for any single company to duplicate the critical ISO support functions.

104. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

105. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford and Aetna agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. CIGNA later joined this effort. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" also refers to a layer of insurance, a higher level of indemnity protection, that sits on top of a self-insurance program, often referred to as a "retention", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

106. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

107. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop standardized excess and umbrella policy forms for broad distribution.

108. Early drafts of the standardized policy language were written by defendant Allstate, ISO staff members and others. Comments were solicited and received from defendants Mer-

rett Syndicate, Three Quays and others in the reinsurance and umbrella and excess insurance markets.

109. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

(a) A retroactive date in the claims-made version;

(b) An absolute pollution exclusion in both versions; and

(c) Defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

110. Specialized reinsurers in London and the United States have also agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Continental Re, and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including Connecticut.

111. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memorialized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

112. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian

exposed insurance/reinsurance business attaching on or after 1st of January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

113. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers in the LMX market.

114. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

CONSPIRACY AMONG ALL DEFENDANTS

115. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the force and effect as if here set forth in full.

116. Beginning on a date unknown to plaintiff, but at least as early as on or about March 1984, and continuing thereafter, the defendants and their co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for CGL property/casualty risks and for reinsurance and retrocessional reinsurance in connection therewith in violation of Section 3 of the Sherman Act, 15 U.S.C. § 1.

117. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, for the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance in connection therewith in order to simultaneously reduce financial exposure to such risks and to

increase underwriting profits therefrom. The substantial terms of the aforesaid agreement were:

(a) To substantially limit, if not eliminate, long tail risks from insurance, reinsurance and retrocessional reinsurance coverage;

(b) To eliminate the availability of CGL occurrence insurance, with its potential for long tail risks;

(c) To eliminate pollution coverage;

(d) To eliminate retroactive liability;

(e) To limit the risk for defendants of the high cost of defending liability claims against insureds;

(f) To conform CGL coverage, including ISO CGL forms to the above limitations; and

(g) To conform excess and umbrella coverage to the above limitations.

118. In order to carry out the foregoing contract, combination or conspiracy, the defendants and their co-conspirators have done those things which they have combined or conspired to do, including, but not limited to:

(a) The use of boycott, coercion and intimidation in order to limit CGL coverage as aforesaid; and

(b) Meeting at various times, places and in different combinations for the purpose of developing and implementing a joint strategy to force the changes and limitations as aforesaid.

119. The aforesaid contract, combination or conspiracy, has had the following effects, among others:

(a) Competition in the insurance, reinsurance and retrocessional reinsurance markets for CGL coverage has been unreasonably restrained;

(b) Competition in the excess and umbrella insurance market has been unreasonably restrained;

(c) The availability of CGL property/casualty insurance for pollution risks has been substantially restricted;

(d) The availability of retroactive CGL coverage has been substantially restricted;

(e) The availability of insurance which will pay both the cost of defending liability claims in full and the policy limits for liability losses is being phased out;

(f) The extent of available CGL coverage has been substantially restricted;

(g) The price for CGL property/casualty coverage has been artificially increased; and

(h) The price of long tail risk coverage for CGL liability insurance has been artificially increased.

SECOND CLAIM FOR RELIEF

CONSPIRACY TO MANIPULATE
ISO CGL FORMS

120. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above, with the same force and effect as if here set forth in full.

121. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Hartford, Allstate, Aetna, CIGNA, ISO, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C.J.W., Thomas A. Greene, R. K. Carvill, RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss and other co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary insurance coverage of CGL risks.

122. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert

of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) To refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

123. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 121 and co-conspirators did those things which they combined or conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) Agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms;

(c) Coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants;

(d) Agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO CGL forms; and

(e) Agreeing to revise further the ISO CGL forms to provide for defense costs within policy limits, but agreeing to delay such revision until the changes in the retroactive date and pollution exclusion terms were introduced to the market and approved by insurance regulators, where necessary.

124. This contract, combination or conspiracy has had the following effects, among others:

(a) The standard ISO CGL policy available in the State of Connecticut excludes all pollution liability coverage;

(b) The standard CGL claims-made policy available in the State of Connecticut excludes retroactive coverage;

(c) The price of pollution liability coverage and retroactive claims-made coverage, where it is available, has been increased;

(d) Competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(e) Defense within policy limits is, or will be, a standard provision of CGL policies.

THIRD CLAIM FOR RELIEF

THE OCCURRENCE BOYCOTT: CONSPIRACY OF LLOYD'S REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ONLY ON A CLAIMS-MADE BASIS

125. Plaintiff repeats and reallege each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

126. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, Ballantyne McKean and other co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

127. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) To refuse to reinsure those CGL risks written on an occurrence form; and

(c) To eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

128. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 126 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) Agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis;

(c) Coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) Coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and/or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

129. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) The market for occurrence CGL coverage available in the State of Connecticut was unreasonably restrained;

(b) Occurrence CGL coverage became unavailable, or limited in availability, in the State of Connecticut for many risks, including municipal general liability risks; and

(c) The price of occurrence liability coverage, where it is available, has been increased.

FOURTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S REINSURERS, BROKERS AND LONDON COMPANY MARKET REINSURERS TO BOYCOTT POLLUTION COVERAGE

130. Plaintiff repeats and reallege each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

131. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett Syndicate, Murray Lawrence, Oxford, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, CNA Re, and Ballantyne McKean, and other co-conspirators, have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

132. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which casualty reinsurance coverage would be provided for CGL risks; and

(b) To limit the availability of pollution coverage in U.S. primary casualty insurance.

133. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 131 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks; and

(b) Agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

134. The aforesaid contract, combination or conspiracy has had the following effects, among others;

(a) Pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of Connecticut;

(b) The price paid by plaintiff for pollution liability coverage, where it is available, has dramatically increased; and

(c) Competition in the market for pollution liability coverage has been unreasonably restrained.

FIFTH CLAIM FOR RELIEF

LLOYD'S, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES

135. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

136. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Oxford, Continental Re, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of Connecticut.

137. Such contract, combination or conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks; and

(b) To limit the availability of property insurance and reinsurance for North American risks.

138. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 136 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance and

(b) Agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause.

139. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) Property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of Connecticut, now exclude a seepage, pollution and contamination clause;

(b) The prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased; and

(c) Competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

SIXTH CLAIM FOR RELIEF

CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS

140. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

141. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, CIGNA, Merrett Syndicate, and Three Quays, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

142. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

143. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in

paragraph 141 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "model" forms and policy language for both umbrella and excess commercial insurance coverages; and

(b) Agreeing upon, drafting, and then promulgating such "model" forms and policy language for use in the umbrella and excess insurance markets.

144. This aforesaid contract, combination or conspiracy has had the following effect, among others: competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM:
VIOLATIONS OF THE
CONNECTICUT ANTI-TRUST ACT

145. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-144 above with the same force and effect as if here set forth in full.

146. The aforesaid contracts, combinations, or conspiracies in unreasonable restraint of trade and commerce are in violation of the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment in its favor and that the Court:

147. Adjudge and decree that defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of

Section 1 of the Sherman Act, 15 U.S.C. § 1 and the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

148. Enjoin defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf from in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations or conspiracies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

149. Order defendant trade associations to maintain accurate records of all attendees at every meeting of its Board Executive Committee, or other committee or subcommittee meeting convened under its auspices, and to make a verbatim record of each such meeting, including meetings held by conference call, and to maintain such records for a period of at least five years after the dates of such meetings, and to make such records available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

150. Order defendant trade associations to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of it, or acting in a capacity reasonably likely to be taken to be on behalf of it and to make such available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

151. Order defendant ISO to issue forms or form coverage parts which include all of the elements of the original 1984 ISO CGL forms, as thereafter lawfully amended.

152. Order defendant ISO to maintain statistical and rating support for the 1973 ISO CGL form and for the 1984 ISO CGL forms.

153. Order defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

154. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

155. Order each defendant reinsurer, and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the Court and the Antitrust Department of the Office of the Attorney General of the State of Connecticut.

156. Enjoin defendants Thomas A. Greene, R. K. Carvill Co. and Ballantyne McKenn from providing information to any reinsurer on the prices, terms or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

157. Enjoin each and every defendant from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

158. Order all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be approved by the Court, on notice to plaintiff, and to report on an annual basis for five years to the Court and plaintiff's counsel with regard to compliance efforts pursuant thereto.

159. Order each and every defendant to establish and maintain a fund for the benefit of plaintiff and the parties on whose behalf this action has been brought for claims for which such persons would have had coverage but for defendants' violations of law.

160. Award three times the damages incurred by plaintiff and the parties upon whose behalf this action has been brought as a consequence of the aforesaid contracts, combinations or conspiracies.

161. Order each defendant to pay plaintiff State of Connecticut civil penalties in an amount to be determined by the Court, in accordance with Conn. Gen. Stat. § 35-38.

162. Order such other, further and different relief as the nature of the case may require and the court may deem just and proper.

163. Order defendants to pay plaintiff's costs of, and attorneys' fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiff demands trial by jury for all of the issues pled herein so triable.

DATED: June 14, 1988

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CONNECTICUT

By: /s/ Robert M. Langer
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(2)

No. 91-1146

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, et al.,

Petitioners,

– against –

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.1

Merrett Underwriting Agency Management Limited is wholly owned by Merrett Holdings PLC.

Three Quays Underwriting Management Limited is wholly owned by Cater Allen Holdings PLC.

Edwards & Payne (Underwriting Agencies) Limited and Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd., are wholly owned by Sturge Group PLC.

No other of these respondents has any parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

No. 91-1146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, et al.,

Petitioners,

– against –

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited submit this response in support of the *Petition for a Writ of Certiorari* in No. 91-1146, arising out of the decision of the United States Court of Appeals for the Ninth Circuit of *In re Insurance Antitrust Litigation.*

Although they are automatically deemed respondents here, these respondents are identically situated to the petitioners in

No. 91-1146. Like petitioners, these respondents are underwriters who trade in the London reinsurance market and one, Sir Peter N. Miller, is a former Chairman of Lloyd's of London. Like petitioners, these respondents are sued in the claims at issue here for allegedly agreeing to restrict the terms and conditions on which they would write reinsurance and retrocessional reinsurance in the London market.

The petition in No. 91-1146 challenges plaintiffs' antitrust standing to bring the claims at issue. These respondents are situated in exactly the same position vis-a-vis plaintiffs as are petitioners, and all petitioners' arguments on plaintiffs' antitrust standing are shared by these respondents. Respondents therefore support the petition for a writ of certiorari and adopt all of the arguments made therein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

(1) (4) (4) (3)

Nos. 91-1111, 1128, 1131, & 1146

In The

Supreme Court of the United States

October Term, 1991

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that insurers' enlistment of reinsurers and others in agreements not to trade, as a means of compelling competitors to stop selling certain insurance products to American consumers, are sufficient to state a claim of "boycott, coercion or intimidation" within the meaning of section 3(b) of the McCarran-Ferguson Act.

2. Whether insurers' participation in unregulated, and, therefore, nonexempt, conspiratorial conduct even qualifies for the antitrust exemption provided by section 2(b) of the McCarran-Ferguson Act.

3. Whether, under the state action doctrine, approval of an insurance policy form developed by a trade association results in antitrust immunity for unauthorized and unsupervised marketplace activities to compel competing insurers to use the form and stop selling certain insurance products to American consumers.

4. Whether foreign reinsurers' self-regulation of some aspects of their business should preclude a federal court from exercising jurisdiction over the foreign reinsurers' anticompetitive conduct when (i) that conduct was targeted at American markets; (ii) that conduct had direct, substantial and foreseeable effects on American commerce; and (iii) no relevant regulation, foreign or domestic, compels or authorizes the anticompetitive conduct.

QUESTIONS PRESENTED – Continued

5. Whether American insurance consumers have standing to sue for injunctive relief and damages under the antitrust laws when they suffer antitrust injury to business or property as a result of a restraint of trade in the market in which they purchase insurance.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The other petitions to which this consolidated opposition brief apply are styled:

Merrett Underwriting Agency Management Limited, et al. v. State of California, et al., No. 91-1128;

Winterthur Reinsurance Corp. of America v. State of California, et al, No. 91-1131; and

Unionamerica Insurance Co. Ltd., et al. v. State of California, et al, No. 91-1146.

Governmental Plaintiffs (Respondents):

State of Alabama
State of Alaska
State of Arizona
State of California
State of Colorado
State of Connecticut
State of Louisiana
State of Maryland
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Montana
State of New Jersey
State of New York
State of Ohio
Commonwealth of Pennsylvania
State of Washington
State of West Virginia
State of Wisconsin
Borough of Chambersburg, Pennsylvania
City of Altoona, Pennsylvania

**PARTIES TO THE PROCEEDING
AND RULE 29.1 STATEMENT – Continued**

City of Baton Rouge, Louisiana
City of Birmingham, Alabama
City of Clay, West Virginia
City of Eunice, Louisiana
City of Lafayette, California
City of Mobile, Alabama
City of Nachitoches, Louisiana
City of New Orleans, Louisiana
City of San Francisco, California
City of Slidell, Louisiana
City of York, Pennsylvania
County of Cowlitz, Washington
County of Hancock, West Virginia
County of Hardin, Ohio
County of Mineral, West Virginia
County of San Benito, California
County of San Francisco, California
County of Schuylkill, Pennsylvania
County of Teton, Montana
County of Wirt, West Virginia
Roosevelt Island [New York] Operating Authority, Inc.
Town of Hanover, Massachusetts
Town of Milford, Massachusetts
Township of Jackson, Ohio
Village of Lake Success, New York
Village of Groton, New York

Private Plaintiffs (Respondents):

Ace Check Cashing, Inc.
Acme Corrugated Box Company, Inc.
Anastasios Markos, t/a Municipal Exxon
Bay Harbor Park Homeowners' Association, Inc.
Bensalem Township Authority

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Big D Building Supply Corporation
Carlisle Day Care Center, Inc.
Carmella M. "Boots" Liberto, t/a R.J. Liberto, Inc.
Durawood, Inc.
Environmental Aviation Sciences, Inc.
Glabman Paramount Furniture Mfg. Co., Inc.
Henry L. Rosenfeld, t/a Mobile Check Cash
Jerry Grant Chemical Associates, Inc.
Keyboard Communications, Inc.
Kirklington Park, Inc.
Les Ray Bobcat, Inc.
P & J Casting Corp.

Defendants (Petitioners):

Allstate Insurance Company
Aetna Casualty & Surety Company
CIGNA Corporation
Hartford Fire Insurance Company
Insurance Services Office, Inc.
Reinsurance Association of America
Constitution Reinsurance Corporation
General Reinsurance Corporation
Mercantile & General Reinsurance Company of America
North American Reinsurance Company
Prudential Reinsurance Company
Winterthur Swiss Insurance Company
Thomas A. Greene & Company, Inc.
C.J.W. (Underwriting Agencies) Limited
D.P. Mann Underwriting Agency Limited
Edwards & Payne (Underwriting Agencies) Limited
Janson Green Management Limited

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Lambert Brothers (Underwriting Agencies) Limited
Merrett Underwriting Agency Management Limited
Murray Lawrence & Partners
Sturge Reinsurance Management Ltd.
Peter N. Miller
Robin A.G. Jackson
Three Quays Underwriting Management Limited
R.K. Carvill & Company
Unionamerica Insurance Company Ltd.
Continental Reinsurance Corporation (U.K.) Limited
CNA Re (U.K.) Ltd.
Kemper Reinsurance London, Ltd.
Excess Insurance Company, Ltd.
Terra Nova Insurance Company Limited
Ballantyne, McKean & Sullivan Limited

Private plaintiffs do not have any corporate parents or subsidiaries within the meaning of Rule 29.1.

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (UA App. A1-A35)[1] The opinion of the district court is reported at 723 F.Supp. 464 (UA App. A36-A86).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. UA App. A87-A99. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in these petitions are sections 1 and 7 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 6a (Merrett App. A93); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* (Hartford App. 98a- 99a); and sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15(a) & 26 (UA App. A100-A102).

STATEMENT

This case comes to this Court without the development of a factual record, in a posture in which the allegations of the plaintiffs' complaints and the reasonable inferences to be drawn from them must be taken as true.[2]

---

[1] Of the four petitions filed with this Court, the appendix to the petition filed in *Unionamerica Insurance Co., Ltd., et al.*, No. 91-1146 is the most complete. Respondents' Consolidated Brief uses that appendix where possible, citing it as "UA App."

[2] *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842, 1845 (1991). Despite its appearance before this Court, this case remains in

(Continued on following page)

Plaintiffs' allegations are reviewed by the Court of Appeals at 938 F.2d at 922-924 (UA App. A13-A18).

At its core, this case is about the enlistment of "reinsurers to compel capitulation" to the demands of a handful of firms. 938 F.2d at 929, UA App. A26. The goal of these firms was to limit the scope of insurance products sold in the United States. *Id.* More specifically, the complaints allege as follows.

In 1984, defendant primary insurers were dissatisfied with the breadth of risks covered by commercial general liability insurance policies.[3] They wanted to shrink the coverage offered in the market, but could not unilaterally cease offering the broader coverages without risking the loss of market share to competitors who remained willing to sell the broader coverage. *See, e.g.*, Conn. Cmpt. ¶¶ 65-67, UA App. A175.

Consequently, the primary insurer defendants, and the domestic and foreign reinsurers they enlisted, conspired to force unwilling competitors to stop insuring certain risks.[4] Collectively, they withdrew necessary inputs required by competing primary insurers who wanted to continue writing these risks. They agreed to withhold reinsurance from U.S. primary insurers who

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(Continued from previous page)

its infancy, having been confined by the trial court to motions designed to test the legal sufficiency of the pleadings. Pre-Trial Order No. 2, ¶ 3. The trial court allowed discovery "insofar as necessary for these motions" (UA App. 38, n. 2), but expressly limited that discovery to matters not likely to raise disputed issues of fact. Pre-Trial Order No. 2, ¶ 5. As a result, no discovery was conducted.

[3] Commercial general liability (CGL) insurance provides coverage against third party claims for businesses and state and local governments.

[4] For example, defendants sought to exclude all pollution coverage.

were unwilling to comply with the conspirators' demands. Without reinsurance, a critical input, the capacity of primary companies to offer coverage to their customers would be drastically eroded. Thereafter, defendant Insurance Services Office, Inc. (ISO), the trade association of primary insurers, withdrew statistical support for the risks.[5] *See, e.g.*, Cal. Cmpt. ¶¶ 63-100, UA App. A123-131.

To achieve the full goals of the conspiracy, defendants also moved to limit excess and umbrella coverage as well as property insurance coverage, to conform to changes effectuated in CGL coverages. By these coordinated steps, defendants were largely able to compel competing insurers to stop selling insurance written on policy forms that would have provided the broader coverage, and to use exclusively the lesser forms which the conspirators forced upon ISO.[6] *See, e.g.*, Cal. Cmpt. ¶¶ 101-110, UA App. A131-133.

No state insurance regulator reviewed or approved the coercive conduct that generated these lesser forms. No state insurance regulator reviewed or approved the conduct that forced the use of these forms in the marketplace. 938 F.2d at 931, UA App. A29.

As the complaints allege, the United States argued[7], and the court of appeals found, this case is about

---

[5] Statistical support provides information that insurers need to price an insurance product.

[6] No state's approval of the conspirators' new policy forms constituted disapproval of older forms. Absent the conspiracy, all forms would have remained available for use in the marketplace.

[7] The United States filed a brief as *amicus curiae* in the court of appeals. In its brief, the United States argued that (i)

(Continued on following page)

agreements by a few primary insurers and reinsurers to replace existing insurance products with a lesser quality product, and the enforcement acts taken by defendants to compel the market success of the lesser product. Defendants' enforcement acts, most notably the withholding of necessary reinsurance and statistical support services, are central to this case. Defendants used these economic weapons to force unwilling firms to stop offering higher quality insurance products to American consumers.

MISSTATEMENTS IN THE PETITIONS.

The petitions contain numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, plaintiffs note the following major misstatements in the petitions:

1. The Hartford petition describes this case as involving "nothing more" than "agreements among" insurers and reinsurers "over coverage risks they were willing to accept". Hartford Ptn. 2. This case, however, involves "much more." 938 F.2d at 929, UA App. A25. The complaints expressly allege that primary insurer defendants met with reinsurers to formulate and set in a motion a joint strategy to eliminate specific coverages from the market. *See*, e.g., Conn. Cmpt. ¶¶ 68, 69, 73, UA App. A175-A177. The complaints also allege that, in furtherance of this goal, reinsurers "threaten[ed] to withhold

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the complaints allege conduct constituting boycott, coercion or intimidation under the McCarran-Ferguson Act; (ii) the state action doctrine does not prohibit antitrust scrutiny of the alleged boycotts; and (iii) principles of international comity do not preclude judicial review of these cases. The decision of the Court of Appeals is in accord with these arguments.

reinsurance from the market for primary companies" that persisted in offering this coverage (Cal. Cmpt. ¶ 71, UA App. A124); reinsurers "threatened a boycott of North American CGL risks unless" the coverages were eliminated (Cal. Cmpt. ¶ 74, UA App. A125); reinsurers collectively refused to cover certain risks (Cal. Cmpt. ¶¶ 95 & 108, UA App. A130 & A133); and ISO withdrew support services for coverages that included these risks. Conn. Cmpt. ¶ 103, UA App. A183-A184; *See also* Conn. Cmpt. ¶ 116-117, UA App. A186-A187; 938 F.2d at 929, UA App. A25. The Winterthur petition even concedes that plaintiffs alleged that primary insurers "induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms." Winterthur Ptn. 3.

2. The Hartford petition asserts that states sanctioned the defendants' activities because "state law authorized collective forms development". Hartford Ptn. 27. States, however specifically prohibit boycotts, which is the conduct at issue in these cases. *See e.g.*, Md. Ann. Code Art. 48A, § 220 (1986); N.J. Stat. Ann. 17:29B-4(4) (1985); *See also* UA App. A61. As the Ninth Circuit found, the challenged conduct "was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." 938 F.2d at 931, UA App. A30.

3. The Hartford petition asserts that "state agencies made substantive determinations of conformity with state policy." Hartford Ptn. 28. The regulators reviewed forms, not market conduct. As the court of appeals found, nothing in the evidence shows that the relevant states supervised or approved the boycotts used to produce agreement on the content or use of the forms. 938 F.2d at 931, UA App. A29.

4. The Hartford petition asserts that insurance and reinsurance markets are so intimately entwined that state regulation of primary insurers is *de facto* regulation of

reinsurers. Hartford Ptn. 15. The Winterthur petition, on the other hand, states that it "strains credulity" to suggest that activities in one market, including boycotts, affect any other market. Winterthur Ptn. 19-20.

5. The Merrett and Unionamerica petitions state that the Ninth Circuit "dismissed" the global conspiracy claim in the Connecticut-style complaints. Merrett Ptn. 4, n. 2; Unionamerica Ptn. 6-7, n. 6. The Ninth Circuit found this count "consistent" with its opinion and mandated that "[o]n remand to the district court, plaintiffs should be afforded the opportunity to amend" to cure a technical pleading defect. 938 F.2d at 931, UA App. A30.

REASONS FOR DENYING THE WRIT

The court of appeals decision does not warrant review. Defendants' real challenge is not to the legal standards applied by the court of appeals. Rather, defendants contest the court of appeals' construction of the facts of these cases as alleged in plaintiffs' complaints. Still seeking to mischaracterize those allegations, defendants seek certiorari on questions not presented by this case.

In resolving the questions actually presented by plaintiffs' allegations, the decision below is faithful to this Court's prior interpretations of the McCarran-Ferguson Act and the state action doctrine. The decision also accords with this Court's articulated principles of international comity and standing. It accords as well with the decisions of other circuits.

In no respect does the case present questions of exceptional legal and practical importance. Defendants cannot seriously contend that the egregious conduct described in plaintiffs' complaints must be countenanced to assure the survival of the insurance industry. No basis for certiorari has been presented.

The decision below concerned motions brought under Federal Rules of Civil Procedure 12(b) and 56 to "test the validity of . . . critical allegations in the complaint[s]." RT at 21 (June 23, 1988). No discovery was conducted in advance of these motions. Nevertheless, at this early stage of the litigation, defendants continue to press a view of the case that differs categorically from the view of plaintiffs. Disputes over case characterization provide no basis for certiorari. Defendants have stated no reasonable basis for review of the decision of the court of appeals and, on the limited factual record before this Court, there is no basis for review.

I. THIS CASE PRESENTS NO OPPORTUNITY TO CLARIFY THE REACHES OF THE MCCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act "embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979). In striking a balance between competition and regulation, the Act exempts from antitrust scrutiny conduct that is the business of insurance and is regulated by the state. 15 U.S.C. § 1012 (b). Otherwise qualified conduct is denied this exemption, however, if it constitutes an agreement or act of boycott, coercion or intimidation. 15 U.S.C. § 1013 (b). These cases allege boycott, coercion and intimidation. Further, these cases allege participation by domestic insurers in unregulated foreign reinsurance activity – conduct that does not even qualify for the McCarran exemption in the first instance. Delicate questions of balance do not arise. The antitrust laws apply.

The court of appeals' holdings on the McCarran-Ferguson Act defenses are unsuited to review by this Court. They present numerous issues, each of which this

Court would need to resolve in defendants' favor before the outcome of these cases would change. Defendants have asked this Court to reject the court of appeals' reading of the complaints; to reverse the court of appeals' opinion that the challenged conduct is a boycott under the McCarran Act; and to reverse the court of appeals' conclusion that the McCarran Act does not shield conspirators' participation in nonexempt conduct. These issues are fact-bound. Moreover, each was resolved below based on conventional applications of legal principles established by this Court.

A. Defendants' petition for certiorari asks this Court to reject the definition of boycott expressed in *St. Paul Fire & Marine Insurance Co. v. Barry*, and used by this Court throughout its history.

The court of appeals observed the clear line between conduct constituting an actionable boycott and conduct constituting permissible joint activity. It correctly found, 938 F.2d 929; UA App. A27, as the United States had urged in its *amicus curiae* brief at 16, that the conduct alleged in this case falls well on the boycott side of the distinguishing line.

The court of appeals' decision rested squarely on *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court's explanation of the boycott exception in the McCarran-Ferguson Act. In *Barry*, this Court surveyed the long line of Supreme Court precedent giving rise to a "common understanding" of the term boycott. *Barry*, 438 U.S. at 541-45. The court of appeals found that the plaintiffs' allegations fit "exactly" within this common understanding. 938 F.2d at 929, UA App. A26. In its brief *amicus curiae*, the United States had urged that result, commenting that

> the combination of primary insurers and reinsurers alleged by plaintiffs falls well within the 'common understanding' (*Barry*, 438 U.S. at 552) of boycott, coercion or intimidation. Indeed, it is precisely the kind of conduct characterized as a boycott, coercion and intimidation in the Sherman Act case that led to the passage of the McCarran-Ferguson Act and with which Congress was specifically concerned when it included [the boycott exclusion in the McCarran-Ferguson Act].

Brief for the United States as *amicus curiae*, filed below, at 16.[8]

Defendants, however, attempt to manufacture a controversy from the colloquy between the majority and dissent in *Barry*. Yet, the majority and dissent in *Barry* would agree that the facts presented here constitute a

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[8] The legislative history of the McCarran-Ferguson Act demonstrates that Congress carefully distinguished voluntary agreements among insurers on policy terms – which could claim antitrust immunity if regulated by the state – from combinations designed to force unwilling competitors to adhere to terms through the concerted denial of necessary trade relationships – which were expressly denied immunity. *Barry*, 438 U.S. at 547-50. Indeed, the Act recognizes that "the vice in the industry was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies." *Barry*, 438 U.S. at 548, quoting Senator O'Mahoney. Senator O'Mahoney describes as "absolutely" unprotected "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which is attempting to do business in the insurance field in any way that was disapproved by them. . . ." 91 Cong. Rec. 1480 (1945) (Statement of Senator O'Mahoney). The central allegations of the complaints concern these kinds of prohibited agreements.

boycott. The majority in *Barry* described a boycott as "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation of the boycotted group. . . . " *Barry*, 438 U.S. at 544-45. The dissent in *Barry* chose different words, but approved the same concept, concluding that *McCarran* boycotts concern "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565.

Thus, the *Barry* majority and minority agree on a bright line test. Whatever else a McCarran boycott may be, it indisputably includes what is alleged here: agreements and acts to withhold an essential input from other insurers as means of forcing their acquiescence. The court of appeals' application of *Barry* was conventional and correct.

Grasping at straws, defendants claim that a McCarran-Ferguson boycott does not exist unless "competing insurance companies [are] absolutely excluded from the market" or there is a "total refusal to deal on any terms". Hartford Ptn. 24. This Court has never required such a finding. Indeed, the case that served as the model for the boycott exception in the McCarran-Ferguson Act, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 535 (1944), involved neither situation.

South-Eastern Underwriters involved a conditional refusal to deal.[9] The facts of *South-Eastern Underwriters* are markedly similar to those involved here. Both cases

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[9] So-called "conditional" refusals are classic boycotts. *E.g.*, *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). These boycotts are not designed to drive competitors from the market. Rather, they are designed to force unwilling competitors to adhere to particular terms of trade.

concern conspirators who refused to deal in order to force unwilling competitors to acquiesce to their terms. In both, reinsurance was withdrawn as the means of forcing acquiescence. Both allege conduct falling well within the common understanding of boycott.

Defendants refer to a "debate" in which some lower courts attempt to distinguish between refusals to deal on any terms (absolute refusals) and refusals to deal on some terms (partial refusals). They would classify only the former as a boycott. This debate is not pertinent here because it only concerns consumer boycotts.[10] The present case does not allege consumer boycotts. It alleges concerted refusals to deal to force competitors to adopt conspirators' trade restrictions.[11]

Some lower courts may seek to confirm that a particular consumer boycott is coercive by inquiring into the absolute or partial nature of the refusal to deal. However, a boycott to force a competitor to adhere to trade terms dictated by conspirators is by definition coercive.[12] Thus,

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[10] The cases cited by defendants as holding that an absolute refusal to deal is essential are consumer boycott cases. *See Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F. 2d 890 (3d Cir.), *cert. den.*, 464 U.S. 938 (1983) and *UNR Industries Inc. v. Continental Ins. Co.*, 607 F. Supp. 855 (N.D. Ill. 1984).

[11] Defendants' citation to 9 E. Kintner & J. Bauer, *Federal Antitrust Law* 245 (1989) is, thus, curious. Kintner & Bauer distinguish consumer boycott cases from those where "a partial or conditional refusal to deal . . . is designed to coerce the target to conform to certain conduct." In the latter situation, Kintner & Bauer note the lack of conflict among lower courts, citing the overwhelming majority of cases holding that an absolute refusal to deal is not required. *Id.* at 245-46.

[12] Contrary to defendants' assertions, this case is not about ordinary course-of-business arrangements against which

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courts confronting boycotts against competitors have not used, and need not use, the elusive distinction between partial and absolute refusals to deal to corroborate coercion.

Decided well within the contours of the "common understanding" of boycott, this case simply presents no opportunity for this Court to test the reaches of its definition of boycott under the McCarran-Ferguson Act.

B. Defendants' exemption forfeiture arguments actually seek to expand the scope of the limited antitrust exemption established by the McCarran-Ferguson Act.

As an additional and independent ground for denying McCarran-Ferguson protection to the defendants' conduct, the court of appeals held that the Act's protection did not extend to the domestic defendants' participation in unregulated agreements with the foreign defendants.[13] Relying on *Beltz Travel Service v. International Air Transport Assn.*, 620 F.2d 1360 (9th Cir. 1980), the

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other insurers found it difficult or expensive to compete. This case is about one group of competitors (defendant primary insurers) seeking to discipline another group of competitors (the unwilling primary insurers) by inducing suppliers (reinsurers and ISO) not to provide necessary supplies (reinsurance and statistical support) unless the unwilling primary insurers acceded to the trade terms of the defendant primary insurers. Thus, there is no necessity in this case to distinguish between "economic exigencies" that flow from the need to respond to protected horizontal agreements and "coercion." The facts as alleged are well within the traditional concept of a boycott.

[13] Petitioners do not challenge the court of appeals' holding that the conduct of the foreign reinsurers fails to qualify for the McCarran exemption because it is not regulated by the states.

court of appeals found an "exemption forfeiture" as a result of domestic insurers' joining in the unregulated (and therefore non-exempt) conduct of foreign reinsurers.

In its holding, the court of appeals applied well-accepted principles. First, "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979).[14] Second, there is nothing novel about holding an otherwise exempt entity liable when it conspires in non-exempt conduct. For example, in the labor exemption context, this Court has stated:

> A union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. . . . But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy.*

Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965) *quoted in Royal Drug*, 440 U.S. at 232, n.39 (emphasis added).[15]

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[14] *See, e.g., Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975); *FMC Corp. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

[15] Defendants claim that the court of appeals exemption forfeiture decision is contrary to *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Hartford Ptn. 16. However, there is

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The record as it currently stands provides no basis for a reconsideration of these long-standing principles. The line between exempt and non-exempt conduct can best be drawn on a well developed factual record, and not on the bare allegations of even a well-pleaded complaint.

Moreover, defendants' exemption forfeiture argument would expand the limited exemption established by the McCarran-Ferguson Act. There is no legal justification for doing so.

The present record fails to indicate in anyway that the insurance industry will become less efficient if this Court fails to expand the McCarran exemption to include insurer conspiracies involving unregulated foreign reinsurance activity. The unavailability of the McCarran

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nothing in *Pireno* that is inconsistent with the decision below. In *Pireno*, this Court considered the factors for determining what is the "business of insurance" under the McCarran Act, and noted that involvement of non-insurance companies in challenged conduct does not necessarily disqualify conduct from being characterized as the "business of insurance." This discussion is not relevant to the present cases, however, because the exemption forfeiture analysis of the court of appeals rested on the "state regulation" prong of the McCarran Act, and not on "the business of insurance" requirement. In short, the court of appeals' unchallenged finding is that the foreign reinsurers' conduct fails to qualify for the McCarran exemption because it is not state regulated. 15 U.S.C. § 1012(b). In finding that the domestic insurers also had no McCarran exemption, the court of appeals below followed this Court's precedent making all conspirators liable for the unlawful acts of their co-conspirators. *See, e.g., Mine Workers v. Pennington*, 381 U.S. at 665-66; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1948).

exemption does not automatically impose antitrust liability on insurers for joint conduct with foreign reinsurers. If an insurer has no exemption with respect to certain conduct, that conduct simply becomes subject to antitrust scrutiny, not necessarily antitrust liability.[16]

Moreover, most companies have no trouble discerning the difference between lawful agreements regarding the supply of important inputs and unlawful agreements to deny competitors such inputs unless the competitors accept particular terms of doing business. The court of appeals' decision leaves insurers free to purchase reinsurance but properly warns them against using such arrangements as exclusionary devices directed against competitors.

The insurance industry ought not be surprised or confused by the court of appeals' ruling. Reinsurers have long regarded themselves as being without antitrust exemption, and have generally conducted their business accordingly.[17] Certainly, primary insurers cannot claim to

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[16] Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product. Neither transaction is ordinarily an antitrust violation.

[17] N. David Thompson, president and chief executive officer of Defendant North American Re, expressed this view in *Forum*, a publication of the American Bar Association:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as

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be hamstrung in their ordinary operations because the court in this case followed settled law and refused to expand an antitrust exemption to include the egregious conduct alleged in the complaints. The McCarran-Ferguson Act has never protected the conduct challenged in these complaints.

II. THE DECISION BELOW RESTS ON A CONVENTIONAL APPLICATION OF THE STATE ACTION DOCTRINE.

This Court has repeatedly held that the state action doctrine immunizes the conduct of private persons from antitrust scrutiny only when that conduct is: (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the State. *California Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). This two-pronged test assures that the challenged anticompetitive conduct is that of the State itself. *Patrick v. Burget*, 486 U.S. 94 (1988). Contrary to defendants' assertion that the court of appeals did not apply "the *Midcal* criteria," Hartford Ptn. 9, the court faithfully applied these criteria. Defendants simply failed to meet the requirement of either prong of the test.

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> the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protection of the McCarran Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981).

First, defendants' conduct was not authorized by any state policy. Indeed, state unfair insurance practices laws expressly prohibit boycotts. See, e.g., Md. Ann. Code Art. 48A, § 220 (1986). N.J. Stat. Ann. 17:29B-4(4) (1985). Second, as the court of appeals found, there is nothing in the record to demonstrate that states supervised or approved the boycotts alleged. 938 F.2d at 931, UA App. A29. Moreover, because some of the anticompetitive acts occurred *after* the approval of policy forms, supervision was impossible.[18] This case presents no issue as to either prong of *Midcal*, and, therefore, no basis for certiorari.

Defendants argue that if states have a clearly articulated policy of permitting joint forms development, then they implicitly have a clearly articulated policy permitting all behind-the-scenes coercive activity that might conceivably be related to the creation and use of a particular form. This argument would expand the state action doctrine to immunize agreements denying competitors access to essential inputs, and the boycotts implementing those agreements, even absent any evidence of public authorization, approval or supervision of the agreements and boycotts. Such an expansion of the state action doctrine would be completely at odds with the decisions of this Court.

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court summarily rejected the defendants' approach. There, four medical malpractice insurance companies agreed that three would not sell insurance to doctors in Rhode Island in order to force

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[18] For example, a key boycott allegation of the complaints is the withdrawal of support for competing ISO forms. Conn. Cmpt. ¶¶ 101-104, UA App. A183-A184; *See also* Cal. Cmpt. ¶¶ 97-100, UA App. A131. As defendants admit, this was not accomplished until "more than a year after the approved 1986 forms had become effective." Hartford Ptn. 6.

them to accept new coverage terms set by St. Paul, the fourth insurer. There, as here, defendants had filed forms with state insurance regulators related to the boycotted coverages. Nevertheless, this Court found no suggestion that the State had authorized the concerted refusals to deal with St. Paul's policyholders. *Barry*, 438 U.S. at 554, n. 26.

The court of appeals adopted the same reasonable distinction in the present case. Approval of policy forms is not approval of market boycotts. The conduct of defendants in these cases "was neither a reasonable nor necessary consequence of the conduct regulated by the state." 938 F.2d at 931, UA App. A30. Defendants simply fail to meet either prong of the *Midcal* test. No further review is warranted.

Because the facts of this case are so unaccommodating, defendants seek to recast them as mere forms development. Operating within this distorted construct, defendants focus on the process by which ISO drafts and obtains approval for insurance forms. But, contrary to defendants' characterization, this case alleges marketplace activities directed at an insurers' individual decision what coverage to offer.

Review is also inappropriate on the present undeveloped record. In support of their summary judgment motion, defendants relied upon the affidavit of Carole Banfield.[19] The Banfield affidavit merely asserts that reinsurers expressed their views on proposed coverages.[20]

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[19] Defendants also submitted an appendix of state insurance statutes.

[20] At its most forceful, the affidavit states:

> ISO and the insurance regulators also discussed the proposed new forms with other interested parties, including insurers, agents, brokers, domestic

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Nothing in this affidavit, or anywhere else in the record, suggests that the various agreements and their attendant boycotts were ever submitted for regulatory review and approval in any of the states subject to the state action motion. 938 F.2d at 931, UA App. A29. Nothing in this affidavit or anywhere else in the record supports a finding that any state regulator actively supervised these activities.

Contrary to defendants' hyperbole, the decision of the court of appeals will not create a crisis in federalism. Nowhere do the complaints attack or even question the regulatory acts of state officials. Accordingly, defendants' invocation of this Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991), is misplaced.

What plaintiffs do challenge are back-room deals, unknown and unapproved by regulators, to force unwilling companies to toe a line drawn by a handful of powerful firms. Open comment and debate are not at issue in these cases. If these boycotts are immune from antitrust scrutiny simply because state regulators see some public manifestation of the boycott, private regulation of the insurance industry by a few firms will supplant public regulation. By deterring these boycotts and forcing full and fair use of state regulatory processes, the court of appeals acted to strengthen state regulation, not to supplant it.

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and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. Banfield Afft. ¶ 9 at 5.

III. THE DECISION TO EXERCISE JURISDICTION IN THIS CASE PROPERLY APPLIES SETTLED PRINCIPLES OF INTERNATIONAL COMITY.

A. This Case Provides No Occasion to Refine the General Principle Favoring the Exercise of Jurisdiction Where American Effects are Direct, Substantial and Foreseeable.

As a general principle, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990).[21] This strong presumption in favor of the exercise of jurisdiction may nonetheless be overcome and principles of comity may come into play where the interests of, and links to, the United States are attenuated. *Timberlane I*, 549 F.2d 613. *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984). Such is not the case here. The anticompetitive effects of the defendants' conduct in the United States

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[21] Although *Kirkpatrick* is an act of state case, its powerful logic applies to this case as well. Moreover, its analysis stems from the same roots as the comity doctrine. *Compare* Restatement (Third) of Foreign Relations 443, comment a [The act of state doctrine has two policy bases: "deference to the executive branch and avoid[ing] disrespect for foreign states"] *with Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976) (*Timberlane I*), *after remand*, 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985) ["Only respect for the role of the executive and for international notions of comity and fairness limit [the] constitutional grant" of power that enables American courts to protect Americans from foreign actions that have anticompetitive effects in the United States].

were direct, substantial and foreseeable[22]; the action of the foreign government creates no true conflict with American antitrust laws.

The lower courts have had occasion to articulate when principles of international comity require abstention from the exercise of jurisdiction.[23] *Timberlane, supra; Laker Airways, Ltd., supra; Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). These articulations derive from the venerable *Alcoa* "effects" test. *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945) (sitting by certification of this Court).[24] The minor variations in these articulations are of no moment in the present case.[25] To the contrary, a court

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[22] As both courts below found, the complaints explicitly allege conduct with a "direct, substantial and reasonably foreseeable" impact on American commerce. 723 F.Supp. at 486, UA App. A73; 938 F.2d at 932, UA App. A31.

[23] *Kirkpatrick* cautions against treating such principles as "doctrines unto themselves" and thereby "expanding judicial incapacities." 493 U.S. at 409.

[24] Under *Alcoa*, "a state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Alcoa*, 148 F.2d at 443. The conduct should, however, "significantly" or "directly" affect the United States commerce or be intended to have that effect. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 705 (1962).

[25] Defendants argue that the court of appeals' *Timberlane* analysis was wrongly "constrained" by reference to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. This misstates the use to which the court of appeals put the FTAIA. Indeed, it simply concluded that its *Timberlane* analysis should be informed, but not superseded, by the "direct, substantial and foreseeable effect" standard articulated in the FTAIA. 938 F.2d at 932; UA App. A31. Thus, the

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would exercise jurisdiction over the facts of this case under any recognized comity test.[26]

The conduct challenged in this case has its principal effects in the United States. The complaints allege a complex and overlapping pattern of conspiratorial activity engaged in by both foreign and domestic actors that targeted United States markets. Initially conceived by the American domestic primary insurer defendants, the conspiratorial scheme sought to limit the number of insurance products offered to insurance consumers in the United States. Foreign and domestic reinsurers were recruited as parties necessary to guarantee that unwilling American competitors would comply with the scheme.

The integral involvement of domestic companies in the scheme to withhold reinsurance belies any notion that such activity was "wholly foreign." 938 F.2d at 932, UA App. A33. Only by ignoring the overarching American focus of the complaints can defendants represent that their motion to dismiss on comity grounds involves solely British actors in British markets. Merrett Ptn. 3-4.[27]

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court of appeals concluded: "as the [FTAIA] does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play." *Id.*, UA App. A32. This is precisely what the court of appeals did here.

[26] The *Timberlane* balancing test employed by the court of appeals is the one most favorable to defendants. Defendants, notably, do not claim that any other circuit court of appeals would have reached a different result.

[27] The so-called "global claim" for relief in the complaints of many plaintiffs explicitly alleges that all defendants participated in a single, overarching conspiracy. Conn. Cmpt. ¶¶ 115-119, UA App. A188-A190. While the court of appeals

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Moreover, the complaints expressly allege that foreign and domestic reinsurers entered into a written agreement to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987, will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." Conn. Cmpt. ¶ 112, UA App. A185-A186; Cal. Cmpt. ¶ 108, UA App. A133. This clear focus on American commerce justifies the decision of the court of appeals to exercise jurisdiction.[28]

At the very most, defendants have only raised factual disputes as to whether the conspirators were exclusively foreign nationals and whether the relevant anticompetitive conduct occurred exclusively abroad.[29] Jurisdiction

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recognized that the trial court had properly dismissed that claim on a narrow technicality of pleading, it directed the trial court on remand to allow plaintiffs an opportunity to cure that deficiency by amendment. 938 F.2d at 931, UA App. A30. Defendants' claim that those allegations were simply dismissed, Merrett Ptn. 4, n. 2, is misleading.

[28] Urging that jurisdiction be exercised, the United States as *amicus curiae* below commented that "[i]nternational comity principles do not mandate automatic deference to the domestic law or jurisdiction objections of foreign states . . . where the conduct challenged has its competitive effects principally in the United States." Brief for the United States of America as *Amicus Curiae*, at 27. In fact, the United States contended that the district court "failed to accord adequate weight to the fact that the competitive effects of the alleged conspiracy were felt primarily within the United States or to the resulting interest of the United States in enforcing its law." *Id.*

[29] No discovery preceded this Rule 12(b)(1) motion and there is no factual record beyond the face of the complaints

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should not be denied on the mere assertion of these factual disputes.

B. No Genuine Conflict Exists Between United States and United Kingdom Law.

In an attempt to counterbalance the compelling reasons for the exercise of jurisdiction, defendants claim that the British "tradition of self-regulation" creates an international conflict of sufficient scope to warrant denying jurisdiction in these cases. Defendants do not suggest that British law requires the foreign defendants to take actions forbidden by American law, that British law forbids what American law requires, nor even that compliance with American antitrust law would substantially interfere with the foreign defendants' mode of conducting business at home and within the European economic community. Merrett Ptn. 6, n. 4. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome, governing competitive practices in the EEC.[30]

The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts and

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that can be evaluated to conduct comity analysis. See *Timberlane I* and *Timberlane II*, *supra* (decided only after substantial discovery and on a full factual record).

[30] Defendants do not here, nor did they below, cite any statute, regulation or court decision to show that English law requires, or even acquiesces in, the conduct challenged by plaintiffs.

interfering with a British tradition of self regulation.[31] The conflict asserted is manifestly insufficient to overcome the interest of the United States in enforcing its own law.

IV. PLAINTIFFS HAVE STANDING AS CONSUMERS IN THE MARKET RESTRAINED BY THE REINSURER BOYCOTTS.

Reinsurers have filed two separate petitions[32] arguing that plaintiffs lack standing to pursue certain claims against them. Both petitions are based upon a fundamental mischaracterization of plaintiffs' complaints. To obscure plaintiffs' unquestionable standing as consumers in the market restrained by reinsurer boycotts, the petitions focus attention on activities in the reinsurance market. Plaintiffs' complaints plainly allege, however, that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers. Cal. Cmpt. ¶¶ 112, 117, 122 & 127, UA App. A134, A136, A137, A139; Conn. Cmpt. ¶¶ 116 & 121, UA App. A186 & A188. The

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[31] Defendants have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country. If the two-pronged *Midcal* test were applied to the conduct of foreign defendants, no immunity would attach. The boycott conduct at issue here is neither permitted by British law, Pet. at 6, n.4, nor actively supervised by the British government.

[32] These are: 1. Docket No. 91-1131 (Winterthur Reinsurance Corp of America); and 2. Docket No. 91-1146 (Unionamerica Insurance Co. Ltd. et al.).

plaintiffs, thus, have standing as consumers that have been injured by the elimination of competing insurance products in this market.[33]

A. Plaintiffs Meet This Court's Test for Standing.

These petitions do not warrant review by this Court because the court of appeals decided the standing issues in these cases strictly in accordance with this Court's decisions in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

AGC involved a boycott allegedly organized by building contractors to coerce prospective developers to use nonunion contractors instead of union contractors. This Court acknowledged that both the developers and the union contractors would have had standing to challenge the boycott because "their injuries would be direct." 459 U.S. at 541.[34]

Thus, *AGC* established that those upon whom the immediate pressure of a boycott falls (developers) and

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[33] Regardless of their standing as insurance purchasers, the state plaintiffs also have standing to seek injunctive relief as common law *parens patriae* on behalf of their respective citizens. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1944). Because citizens in each state have suffered antitrust injury, even as defined by defendants in their standing petitions, nothing in this Court's opinion in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), would limit the states' *parens* authority in these cases. See *California v. American Stores Co., Inc.*, 495 U.S. 271 (1990).

[34] However, the mere employees of these victims (or the union which represents them, the plaintiff in *AGC*) would not have standing.

their suppliers (union contractors) whose goods or services have been diminished in value because of the boycott each have standing to recover antitrust damages.

This principle is fully consistent with the Court's prior decision in *McCready*. There, both the psychologists who felt the immediate pressure of a boycott and the patients who purchased the boycotted product, psychological services, had standing to sue. *McCready*, 457 U.S. at 469 n.4, 478-81. In *McCready*, the patient was considered "the direct victim of unlawful coercion." *AGC*, 459 U.S. at 540, n.44. Indeed, to the extent that there might be a difference between suppliers to the direct boycott victim (the union contractors in *AGC*) and purchasers from the direct boycott victim (the patient in *McCready*), the courts have tended to favor the latter. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.1d (1991 Supp.).

In the instant case the initial victims of the boycott are non-defendant primary insurers who were coerced by reinsurer and primary insurer defendants. Plaintiffs are purchasers of the diminished insurance products sold by the defendant primary insurers and their victims, competing, non-defendant primary insurers. Plaintiffs, thus, are in the same position as the patient in *McCready* and are in an analogous position to the union contractors in *AGC*.

B. This Case Does Not Challenge the Boundaries of Standing Doctrine.

In *AGC* this Court established a multi-factor test for standing.[35] As to the claims for damages, each petition

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[35] The *AGC* factors are: the intent of the conspirators (459 U.S. at 537); the causal connection between the violation alleged and harm claimed (*id.*); the nature of plaintiffs' injury,

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advocates a different formulation of that test. Review is not warranted, however, because plaintiffs have standing under either formulation for both damages and injunctive relief.[36]

The Winterthur petition argues that plaintiffs must satisfy all of the *AGC* factors to have standing. The decision below correctly holds that plaintiffs satisfy each factor for all claims. The court of appeals noted that the "character-of-damages" factor as applied to the reinsurer-only claims presented some problems of damage allocation tending against standing for these claims. However, even as to that factor the court of appeals held that, on balance, the factor "is in favor of standing." 938 F.2d at 926, UA App. A20.

Furthermore, the global conspiracy claim[37] overcomes any "character-of-damages" concerns. Under the

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i.e., antitrust injury (*id.* at 538); the directness or indirectness of the claimed injury in the chain of causation (*id.* at 540-541); existence of a better class of plaintiffs (*id.* at 542); and whether the damages claimed are either speculative in terms of causation or duplicative (*id.* at 542-545).

[36] *Cargill* recognizes important differences between damages and injunctive remedies and holds that "some" *AGC* factors "are not relevant under § 16," i.e. factors addressing multiple lawsuits and duplicative recoveries. *Cargill*, 479 U.S. at 111 n.6.

[37] The Unionamerica petition does not challenge plaintiffs' standing under the global conspiracy claim, but misleadingly refers to it as "dismissed." UA Ptn. 6-7, n.6. The court of appeals granted plaintiffs leave to amend that claim to cure technical problems. See n.27, *supra*. The Winterthur petition concedes the continued vitality of the claim, but apparently contends that the Court should ignore direct purchases from coconspirators and deny standing. Winterthur Ptn. 20 n.8.

global claim, the reinsurers are coconspirators of the defendant primary insurers from which plaintiffs made direct purchases. *See Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). When a plaintiff purchases directly from a named coconspirator of an antitrust violator, none of the policy concerns of *Illinois Brick*[38] are implicated. P. Areeda & H. Hovenkamp, *Antitrust Law* § 337.2e (1991 Supp.). Any issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation. In light of plaintiffs' standing to sue defendants under the global claim, a fragmented review of the reinsurance-only claims would be premature and potentially futile.

The Unionamerica petition argues that "directness" and "the nature of the injury" are separate and independent limitations on standing. Because the court of appeals correctly held that plaintiffs satisfied both requirements, consideration of this question should await a case in which one of the two elements, and, therefore, the outcome of the case, is in doubt.

C. Plaintiffs Suffered Distinct Injuries.

Defendants' suggestion that the damages sought by the plaintiffs in these cases are either speculative or duplicative is simply without merit. The speculativeness referred to in *AGC* only relates to causation of injury and not to its quantification. *AGC*, 459 U.S. at 542 ("the

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[38] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

alleged effects on the Union may have been produced by independent factors").

The danger of duplicative recoveries does not exist here. This is not a passing-on case where there will be "conflicting claims to a common fund," *id.* at 544, that might give rise to concerns similar to those in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The boycotts in these cases give rise to two types of injury that are suffered by distinct and different classes of potential plaintiffs. The plaintiffs currently before the Court were injured by the product output restrictions and the overcharges that flowed from the violation. The competing, non-defendant primary insurers were injured by the enforcement effects of defendants' cartel. Each class of potential plaintiffs suffered distinct and separable injuries. Indeed, this Court's decisions in both *AGC* and *McCready* expressly recognized the separate standing of different classes of plaintiffs for each of these types of injuries.

No court has ever held that it would be duplicative to allow standing for the victims of violations which also cause actionable injury to defendants' competitors. Such a holding would limit standing to competitors in a wide variety of cases. Such a holding would, for example, deny standing to consumers who pay the overcharges imposed by a monopolist that unlawfully excludes competitors from the market.

Defendants have not offered this Court any principled basis for denying standing to the consumers of cartellized insurance products in this case. Thus, they have not provided any basis for review of the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

DATED this 14th day of February, 1992

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No. 91-1146

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

—against—

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

This Court should not allow the respondent plaintiffs' combined response to the two antitrust standing petitions arising from these cases to obscure the questions separately presented by this petition. Unlike the petition filed by Winterthur Reinsurance Corporation of America, No. 91-1131, this petition addresses claims alleging conspiracies that include only London-based reinsurers—and not the primary insurers from whom plaintiffs purchase. It presents issues the plaintiffs have virtually admitted are worthy of review, and it presents those issues at a stage and on facts that fairly pose those issues for decision.

As to the claims raised in this petition, there is no "[d]ispute[ ] over case characterization" and no "mischaracterization of plaintiffs' complaints." Br. Opp. 7, 25. The complaints explicitly state that the plaintiffs sue as purchasers of primary insurance, that the primary insurers from whom they purchase in turn purchase reinsurance from reinsurers, and that the reinsurers in turn purchase retrocessional reinsurance from retrocessional reinsurers. It is undisputed that the conspiracies alleged in the London-reinsurer claims occurred only in the London reinsurance or retrocessional reinsurance markets, in which plaintiffs are *not* consumers, and only among entities operating in those markets. The factual allegations underlying this petition therefore differ fundamentally both from those underlying the Winterthur petition, which addresses claims alleging conspiracies among both primary insurers and reinsurers, and from the characterizations of the claims relied upon by plaintiffs in their brief in opposition.

The Ninth Circuit held that even though "the action of the reinsurers took effect through the primary insurers," the plaintiffs had established standing simply by alleging that the impact upon them was nonetheless "direct." The Ninth Circuit reached this result by including antitrust injury as one factor among several to be balanced in order to determine plaintiffs' standing. The Ninth Circuit's holding and analysis

are flatly inconsistent with this Court's teaching and, unless corrected by this Court, will undermine the important policies advanced by antitrust standing doctrine.

I. Plaintiffs Do Not Deny the Need for this Court to Clarify that Antitrust Injury and Directness Are Independent Requirements of Antitrust Standing

This Court's failure definitively to establish antitrust injury and directness as separate and independent elements of a single standing requirement—both of which must be satisfied by an antitrust plaintiff—"has bred much confusion in the lower federal courts." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991); *see also Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1512 (1985). Plaintiffs do not deny that this confusion exists or that it warrants this Court's attention. In fact, their own submission reflects the confusion by listing "the nature of plaintiffs' injury, *i.e.*, antitrust injury" as one of a series of *Associated General Contractors* factors that must be weighed to determine standing. Br. Opp. 27 n.35. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983). Plaintiffs suggest, however, that these cases do not provide an appropriate occasion to eliminate the confusion because the Court of Appeals held that "plaintiffs satisfied both requirements." Br. Opp. 29.

Plaintiffs' suggestion simply ignores the reasoning of the Court of Appeals. The Court of Appeals' erroneous inclusion of antitrust injury as a factor to be weighed in the directness inquiry plainly contributed to its otherwise inexplicable determination that plaintiffs have standing to sue reinsurers from whom they admittedly were not direct purchasers and who sold products (reinsurance and retrocessional reinsurance)

that plaintiffs could not buy. UA App. A20-21.[1] This Court should therefore take the opportunity to correct the Ninth Circuit's analysis—and that of some other courts of appeals, Pet. 13 & n.14—to confirm that a finding of antitrust injury is the starting point for an inquiry into standing, not a factor in that inquiry. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986); *Todorov*, 921 F.2d at 1451 n.20.[2] At the same time, the Court should remedy the Ninth Circuit's evisceration of the directness requirement itself.

II. Plaintiffs' Brief in Opposition Confirms the Need for this Court to Undo the Ninth Circuit's Redefinition of the Directness Requirement

Plaintiffs argue that petitioners improperly "focus attention on activities in the reinsurance market," while plaintiffs "plainly allege . . . that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers." Br. Opp. 25 (emphasis in original). This argument simply misses the point. The object of the directness inquiry is not to determine whether the market in which plaintiffs participate was restrained (which is the object of the antitrust injury inquiry), but whether the plaintiffs are the parties that

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1 Since its decision in this case, the Ninth Circuit has continued to include the antitrust injury "factor" in its directness inquiry. *See Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162 n.4 (9th Cir. 1991) (listing the "nature of the plaintiff's claimed injury" as one of five factors to consider).

2 Because plaintiffs also sue for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, the questions presented by this petition also afford an opportunity to clarify the directness showing that a plaintiff must make in order to have standing to pursue injunctive relief. *See Cargill*, 479 U.S. at 111 n.6 ("[s]tanding analysis under § 16 will not always be identical to standing analysis under § 4"). Because the plaintiff states also bring claims as *parens patriae* on behalf of their general welfare and economy, these cases also afford the opportunity to clarify the requirements for *parens patriae* standing in light of modern antitrust standing doctrine. *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

can most efficiently sue the entities responsible for the restraint. Pet. 9, 15-16, 19-21. Here, plaintiffs readily admit that they are not the "initial victims" of the alleged anticompetitive behavior. Br. Opp. 27. They allege, instead, that the restraint in the market in which they participate was only the indirect result of a restraint imposed against an upstream class of economic actors in a market in which plaintiffs do not participate.

Plaintiffs' own characterization of their claims shows that they cannot satisfy the directness requirement. While plaintiffs' description of reinsurance as an "input" into insurance seriously oversimplifies the nature of reinsurance coverage, it accurately captures the market relationships relevant to plaintiffs' claim for standing. To quote plaintiffs:

> Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product.

Br. Opp. 15 n.16. It could not be plainer that a purchaser of a Chrysler automobile would not have standing to sue Chrysler's suppliers of steel on the ground that a price-fixing conspiracy among those suppliers had inflated the price of the automobile. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Associated General Contractors*, 459 U.S. at 541; *Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2812 (1990). It is equally plain that these purchasers of primary insurance do not have standing to sue reinsurers on claims that conspiracies involving only reinsurers inflated the price of primary insurance or restricted the terms on which it would be available. Because the Court of Appeals redefined the directness requirement to permit such a suit, this Court should grant the writ.

Finally, plaintiffs suggest that this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which the Court of Appeals did not cite or discuss, supports their

claim for standing. In *McCready*, however, the Court accorded standing to a plaintiff who alleged "that she was a consumer of psychotherapeutic services" and had been injured by a conspiracy between a society of psychiatrists and a group health plan "to restrain competition in the market for such services." *Associated General Contractors*, 459 U.S. at 538 (footnote omitted); *see McCready*, 457 U.S. at 467, 469 n.4, 479-80 & n.17, 481. Unlike plaintiffs here, Mrs. McCready had standing as a consumer in the *directly* restrained market.

Plaintiffs' misuse of *McCready* illustrates the need for this Court to clarify this area. Like *Associated General Contractors*, the *McCready* decision "actively confused the discrete questions of antitrust injury and standing." Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1506 (1985).[3] Indeed, the Ninth Circuit has misapplied *McCready* to "establish a new dimension of liability" not contemplated by *Associated General Contractors*. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 749 (9th Cir. 1984) (Kennedy, J., dissenting), *cert. dismissed*, 469 U.S. 1200 (1985).[4] To the extent the decision below implicates the *McCready* decision, it is that much more important that this Court review it.

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3 *See also* Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221, 1270-71 (1989).

4 In particular, the courts of appeals have taken divergent views of the *McCready* Court's discussion of "inextricably intertwined" injury and its relationship to antitrust standing. *Compare Peck v. General Motors Corp.*, 894 F.2d 844, 847 (6th Cir. 1990) (to succeed on "inextricably intertwined" theory of *McCready*, plaintiff must show that it was used as a "fulcrum, conduit or market force to injure competitors or participants in the relevant product or geographical markets") *with State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 48 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990) (analyzing whether plaintiff had a "symbiotic relationship" with the direct victim to determine whether its injury was "inextricably intertwined").

III. The Global Conspiracy Claim Is Irrelevant to the Present Petition

In a final attempt to skirt the issues raised by this petition, plaintiffs suggest that their global conspiracy claim solves any standing problems they might otherwise face. Br. Opp. 28-29. But the global conspiracy claim was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, and the Court of Appeals affirmed that dismissal. It is therefore neither addressed by this petition nor relevant to the issues raised.[5]

Surely the failure to state a claim pursuant to Rule 12(b)(6) is no mere "technical problem[ ]." Br. Opp. 28 n.37; *see also* Br. Opp. 22 n.27. And the direction of the Court of Appeals that the District Court grant plaintiffs leave to replead provides no guarantee that plaintiffs will succeed in doing so. Though the product of a two-year precomplaint investigation, UA App. A58, A82, the complaints as filed include not a single concrete allegation linking the London reinsurer conspiracies addressed by this petition with the conspiracies between primary insurers and reinsurers alleged in the remaining claims. Indeed, the eight states that originally filed complaints did not include a global conspiracy claim, and only one of those states later amended its complaint to do so.

Most importantly, the Court of Appeals did not rely on the global conspiracy claim to accord these plaintiffs standing, but instead expressly held that the injury plaintiffs alleged they had suffered from the reinsurer-only conspiracies was sufficiently direct to confer standing. Thus, the prospect that plaintiffs may attempt to replead the global conspiracy claim neither diminishes the suitability of these cases for review by this Court nor overcomes the right of these defendants to be

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5 Because the global conspiracy claim was dismissed, plaintiffs' reliance on *Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985), and *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), is misplaced. Those cases deal with allegations of a vertical conspiracy including one level of conspirators with whom plaintiffs dealt. They are thus inapplicable to the reinsurer-only claims addressed by this petition.

free of presently pending claims that plaintiffs have no standing to pursue.

CONCLUSION

For the foregoing reasons and those set forth in the petition, a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit to review that Court's judgment and opinion.

Respectfully submitted,

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February 25, 1992

Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

Nos. 91-1111, 91-1128, 91-1131, and 91-1146

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act by allegedly conspiring with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

3. Whether petitioners' alleged activities are exempt from the antitrust laws under the state action doctrine.

4. Whether respondents have antitrust standing.

5. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 91-1111, 91-1128, 91-1131, and 91-1146

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against several primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Pri-

mary" insurers (including petitioners Hartford Fire Insuance Co., Allstate Insurance Co., Aetna Casualty and Surety Co., and CIGNA Corporation) sell CGL insurance to businesses, nonprofit organizations, and government entities. Pet. App. A13.[1]

"Reinsurers" sell insurance to insurers. ("Retrocessional" insurance is insurance for reinsurers. Pet. App. A13.) Primary insurers purchase reinsurance through a network of specialized insurance brokers and underwriters, many of whom do business through Lloyd's of London. The reinsurers' participation in CGL insurance protects the primary insurance companies against catastrophic losses. In addition, primary insurers that "cede" some of the risks they underwrite to reinsurers are freed from the obligation to maintain large reserves against those risks, and thus are able to sell more insurance. Petitioners include domestic reinsurers, such as General Reinsurance Corp. and Winterthur Reinsurance Corp. of America; foreign reinsurers, including six reinsurers known collectively as the "London Company Market" corporations; and several insurance brokers. Pet. App. A13-A14, A116.

Defendant Insurance Services Office (ISO) is an association of more than 1,400 property and casualty insurers that develops standard forms of insurance policies, collects data, and estimates insurance risks. ISO also presents the standard forms to state insurance officials for approval. CGL insurance is written primarily on standard forms developed by ISO. Defendant Reinsurance Association of America is primarily a lobbying organization. Pet. App. A14.

b. For many years, primary insurers sold CGL insurance primarily on an "occurrence" basis. An "occurrence" policy protects the insured against occurrences of liability during the life of the policy, regardless of when a claim is filed. Occurrence insurance has a "long tail"—*i.e.*,

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[1] Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in No. 91-1146 (the Unionamerica Petition).

claims may be filed against the insurance company long after the policy has expired. Pet. App. A14.

Respondents allege that the defendant primary insurers undertook a campaign to end sales of CGL insurance on an occurrence basis, and to substitute "claims-made" insurance. A "claims-made" policy, as its name suggests, provides protection only against claims that are made during the life of the policy. In addition to substituting "claims-made" CGL insurance for "occurrence" insurance, respondents allege that the defendant primary insurers sought to (1) include in claims-made policies a "retroactive date" provision that cuts off coverage for occurrences prior to the retroactive date, even if a claim is filed during the life of the policy, (2) exclude from CGL coverage "sudden and accidental" pollution coverage, and (3) limit coverage of legal defense costs. Pet. App. A14, A121-A122.

Respondents allege that other primary insurers and ISO did not agree to these changes. Instead, in 1984 ISO issued standard CGL policy forms for both occurrence and claims-made insurance. ISO's claims-made policy did not include a retroactive date provision. In addition, both types of ISO policies covered sudden and accidental pollution damages and legal defense costs. Pet. App. A122.

Respondents allege that the defendant primary insurers, unsatisfied with this state of affairs, took steps to coerce recalcitrant competitors to accept the proposed restrictions on CGL coverage. To achieve their goal, the defendant primary insurers allegedly enlisted the assistance of domestic and foreign reinsurers. The conspirators allegedly agreed that the reinsurers would refuse to reinsure any CGL risks on the disputed ISO forms until ISO (1) eliminated the CGL occurrence form, (2) excluded pollution liability coverage from its CGL forms, (3) added a retroactive date to the claims-made form, and (4) limited coverage of defense costs. Pet. App. A15, A123-A127.

Respondents allege that petitioners' scheme was successful. ISO withdrew the 1984 forms and replaced them with forms that excluded pollution coverage and included

a retroactive date provision. Under continuing pressure from the London reinsurers, ISO later withdrew statistical and actuarial support for CGL occurrence forms. Without ISO's support, respondents allege, primary insurers were no longer able to write occurrence insurance. Pet. App. A15, A126-A133.

In 1985, petitioners successfully urged ISO to develop standardized forms of "excess" and "umbrella" insurance that contained a retroactive date, a pollution exclusion, and limits on defense costs. The effect of these modifications was to ensure that consumers could not obtain the disputed types of insurance coverage by purchasing excess or umbrella insurance. Pet. App. A131-A132, A144-A145.

2. The district court dismissed the complaints. Pet. App. A36-A86. It concluded that the challenged conduct was part of the "business of insurance," and therefore immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. A47-A49. The court held that petitioners' alleged conduct was not within the "boycott" exception to the McCarran-Ferguson immunity, because respondents had not alleged a refusal to deal on any terms or "conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at A58.

The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern activities related to the development of standard CGL forms. The court found that the States had authorized collective development of insurance forms and had approved the more restrictive CGL forms favored by petitioners. Pet. App. A59-A63.

The court rejected petitioners' contentions that respondents lacked antitrust standing, and that respondents had not alleged a sufficiently direct impact on United States commerce to satisfy the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. Pet. App. A65-A67, A73-A82. Relying on principles of international comity set forth in *Timberlane Lumber Co.* v.

Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), however, the court dismissed three claims directed solely at the London reinsurers (Counts 5, 6, and 8 of the California complaint). The court concluded that application of the federal antitrust laws to those claims would lead to a significant conflict with English law and policy. Pet. App. A69-A82.

Because the district court dismissed all the federal claims, it also dismissed the pendent state law claims. Pet. App. A83.

3. The court of appeals reversed. Pet. App. A1-A35. The court held that petitioners had not demonstrated that they were entitled to immunity under the McCarran-Ferguson Act for two independent reasons. First, because the States have no power to regulate reinsurance contracts entered into in foreign nations, the court concluded that unregulated activities with which the defendants were charged fall outside the scope of the McCarran-Ferguson Act. Pet. App. A22-A24. The court further concluded that the domestic defendants forfeited their McCarran-Ferguson immunity "when they conspired with the foreign defendants." *Id.* at A24.

Second, the court held that petitioners' alleged conduct is within the boycott exception to McCarran-Ferguson immunity. The court emphasized respondents' allegations that the insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands." Pet. App. A26. This, the court held, alleges a McCarran-Ferguson Act boycott. The court rejected the district court's suggestion that the boycott exception applies only to an absolute refusal to deal on any terms. It explained that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* at A27.

The court of appeals also reversed the district court's state action ruling. Pet. App. A29-A30. The court explained that the anticompetitive conduct at issue is the alleged boycott, and there is no evidence that any State

authorized or actively supervised the boycott. The court held that the States' approval of the ISO forms was not sufficient to confer state action immunity on the boycott, because "state approval of one activity is not state approval of a related but distinct activity." *Id.* at A29.

The court of appeals agreed with the district court that respondents have antitrust standing against all petitioners and that the FTAIA does not bar any of respondents' claims. Pet. App. A19-A21, A30-A31. But the court of appeals, unlike the district court, concluded that comity was not a bar to respondents' claims against the London reinsurers. *Id.* at A30-A35. In applying the balancing analysis of its *Timberlane* decision, the court of appeals concluded that "[a] single factor points toward abstention: the conflict with a long-established British policy towards * * * the underwriting of insurance." *Id.* at A35. But the court concluded that "[e]very other factor —nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction." *Ibid.*

DISCUSSION

This is a complex and important case. The parties include 19 States and several major domestic and foreign insurance companies. Petitioners state (H. Pet. 11) that the court of appeals' ruling "is of enormous importance and has disrupted the most basic operations of the insurance industry." Moreover, state officials have publicly recognized the significance both of the litigation generally and of the court of appeals' decision specifically.[2] The court's interlocutory decision does not, however, conflict with any decision of this Court or any other court of appeals. Although we are troubled by the court's

[2] See H. Pet. 10-11 (quoting state officials' comments). See also N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium 109 (Jan. 28, 1992) (remarks of George Sampson, Chief of Antitrust Enforcement, State of New York) ("[I]t is incumbent upon the industry to examine many of the activities that currently go on in the industry and take a very careful look.").

suggestion that a domestic insurance company loses its antitrust immunity under the McCarran-Ferguson Act merely because it acts in concert with foreign reinsurers, that suggestion was part of an alternative holding that did not alter the result. Accordingly, we do not believe that review by this Court is warranted at this time.[3]

1. The McCarran-Ferguson Act exempts petitioners' activities from the federal antitrust laws to the extent that they are part of "the business of insurance," are "regulated by State Law," and are not "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1012(b), 1013(b). The petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Pet. 14-18) that the court of appeals erred in holding that they are not entitled to antitrust immunity under the McCarran-Ferguson Act because they allegedly conspired with foreign reinsurers that are not generally subject to regulation by the States.[4]

We disagree with the court of appeals' suggestion that domestic insurers whose activities would otherwise be immune under the McCarran-Ferguson Act automatically forfeit that immunity merely because they participate in those activities with foreign reinsurers that are generally not subject to state regulation.[5] As the Hartford peti-

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[3] Although we believe that the court of appeals reached the correct result, we intend no criticism of the district court's efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. Indeed, the government strongly endorses judicial management techniques of the sort that we understand were employed in this case to streamline antitrust litigation. Moreover, we do not view the court of appeals' decision as precluding the possibility that the case can be resolved on remand on motion for summary judgment.

[4] The petitioner in No. 91-1131, Winterthur Reinsurance Corp., raises each of the questions presented by the Hartford petitioners, and incorporates by reference the Hartford petitioners' arguments. W. Pet. 24.

[5] As the court of appeals observed (Pet. App. A22-A23), this Court has held that a State may not regulate reinsurers where no act in the course of formation, performance, or discharge of the reinsurance contract takes place within the State. See *Connecticut*

tioners correctly note (H. Pet. 15), McCarran-Ferguson immunity applies to "the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. 1012(b). The statutory language focuses not on the nature of the "entity" at issue, but on the nature of the activity at issue—whether it is "the business of insurance"—and whether that activity is regulated by state law. Consequently, contrary to the court of appeals' conclusion, the mere fact that an "exempt entity" (*i.e.*, a domestic insurance company) acts in concert with a "nonexempt entit[y]" such as a foreign reinsurer does not automatically cause the exempt entity to "forfeit[] [its] antitrust exemption." Pet. App. A24.[6]

Despite our disagreement with the court of appeals' analysis in this respect, we do not believe that the court's ruling warrants interlocutory review. For reasons discussed below, we believe that the court of appeals correctly held that respondents have alleged conduct within the boycott exception to antitrust immunity under McCarran-Ferguson. The court's boycott ruling was "an 'independent ground' of decision" for denying McCarran-Ferguson immunity (H. Pet. 9); consequently, reversing the "forfeiture" ruling would not alter the court of appeals' decision. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956) ("This Court * * * reviews judgments, not statements in opinions."); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

General Life Ins. Co. v. *Johnson*, 303 U.S. 77, 81 (1938). The legislative history of McCarran-Ferguson indicates that Congress understood and accepted that limitation on state regulatory authority. See 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

[6] It is true, as petitioners recognize (H. Pet. 16), that one of the factors that is relevant to determining whether a particular practice is part of the "business of insurance" is whether the practice is "limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). But respondents do not dispute that reinsurers are entities within the insurance industry, and we agree that reinsurance is "a very essential phase" of the business of insurance. 90 Cong. Rec. 6528 (1944) (statement of Rep. Miller).

837, 842 (1984).[7] In addition, unless the particular activities at issue were "regulated by State Law," they would fail for that reason to qualify for McCarran-Ferguson immunity. 15 U.S.C. 1012(b).

We recognize that primary insurers in the United States traditionally have had close ties with foreign reinsurers. Accordingly, petitioners are concerned about the implications of the court of appeals' reasoning for their day-to-day business activities. This is a legitimate and justifiable concern, but we are not persuaded that the Ninth Circuit's brief and singularly unilluminating discussion of the forfeiture issue warrants interlocutory review. In our view, primary insurers may indeed engage in joint activities with foreign reinsurers without forfeiting McCarran-Ferguson immunity to the extent that (1) the primary insurers are engaged in the business of insurance, and (2) their activities are regulated by the States. The second requirement depends, of course, on the law of each individual State. As to the first requirement, we fully agree with petitioners (and respondents do not appear to disagree) that reinsurance is part of the business of insurance, and that consequently discussions and agreements between primary insurers and reinsurers concerning the terms and conditions of insurance or reinsurance will generally fall within "the business of insurance."

2. a. The Hartford petitioners also contend (H. Pet. 18-25) that the court of appeals erred in ruling that their alleged activities constituted a boycott within the meaning of the McCarran-Ferguson Act. We are unpersuaded.

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[7] The court of appeals concluded (Pet. App. A28-A29) that respondents have not alleged a boycott directed at excess and umbrella insurance. In our view, respondents' complaint may fairly be read as alleging that petitioners' alleged activities in the excess and umbrella market were in aid of the CGL boycott. In any event, the petitioners who deal in excess and umbrella insurance also deal in CGL insurance. Consequently, interlocutory review of the "forfeiture" issue would result, at most, in dismissal of some relatively minor claims against some petitioners.

Notwithstanding petitioners' assertion (H. Pet. 24), the court of appeals did not find "a boycott based on nothing more than collective agreements among insurers and reinsurers as to the coverage risks they would be willing to accept." To the contrary, the court of appeals expressly recognized that McCarran-Ferguson allowed the defendants to "confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable." Pet. App. A25. The court concluded, however, that petitioners "are charged with much more." *Ibid.* In particular, the court explained, respondents allege that the primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. * * * [T]he defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *Id.* at A26-A27.[8]

In our view, the conduct alleged in the complaint falls within the exception to McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation."[9] 15 U.S.C. 1013(b). Petitioners correctly note (H. Pet. 18) that this Court has decided only one case concerning the scope of the so-called boycott exception to McCarran-Ferguson. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the four medical malpractice insurers in Rhode Island agreed that the three competitors of St. Paul would not sell insurance to St. Paul's cus-

[8] Petitioners contend (H. Pet. 24) that the court of appeals misread the complaints, and that "in each instance" respondents' allegations "amount[] to no more than an agreement as to the insurability of risks and the terms and conditions of insurance coverage." Fairly read, however, respondents' complaints adequately allege that petitioners enlisted reinsurers to compel dissenting primary insurers to go along with petitioners' demands—that is, they engaged in private regulation of the terms on which CGL insurance would be offered. In any event, interlocutory review of that fact-bound determination is not warranted.

[9] The word "boycott" derives from the treatment accorded to Charles C. Boycott, an English land agent in Ireland who was ostracized in 1880 for refusing to reduce rents. See *Webster's Third New International Dictionary* 264 (1986).

tomers. The *Barry* boycott was thus unusual because it was aimed directly at consumers rather than at competitors. The Court nevertheless concluded in *Barry* that the boycott provision was also intended to reach efforts by insurance companies to coerce unwilling competitors to adopt particular rules or practices. See 438 U.S. at 541, 549 ("boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and includes "regulation by private combinations [or] groups"). The dissenters in *Barry* agreed with the Court on this point. See *id.* at 565 (Stewart, J., dissenting) (boycott exception applies to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices").

The *Barry* Court recognized that a clear example of a boycott was the activity at issue in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *Barry*, 438 U.S. at 546-550. *South-Eastern Underwriters* involved, among other things, conduct similar to that alleged here: a group of primary insurers conspired with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms. See 322 U.S. at 535 ("The conspirators * * * employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies * * *. *Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks.*") (emphasis added).

The legislative history of the McCarran-Ferguson Act reinforces the conclusion that the activities alleged here fall within the boycott exception. Senator O'Mahoney, one of the Senate conferees and a floor manager of the legislation (91 Cong. Rec. 1208 (1945)), put the matter succinctly: "[A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in

a way that was disapproved by them, would be absolutely prohibited by this provision." *Id.* at 1480. See also *id.* at 1483 (statement of Sen. O'Mahoney) (Sherman Act will continue to prevent private groups from "regulat[ing] in the field of interstate commerce").

b. We disagree with the Hartford petitioners' suggestion (H. Pet. 21-24) that the boycott exception applies only to an "absolute refusal to deal upon any terms." H. Pet. 21. It is true that in *Barry* the Court noted that four medical malpractice insurers were "alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth." 438 U.S. at 552. But the Court made that comment in the course of its analysis of the unusual boycott at issue in *Barry*, which was directed at consumers rather than competitors. Indeed, the Court began its discussion by holding that "the term 'boycott' is not limited to concerted activity against insurance companies," and then proceeded to consider whether "the type of private conduct alleged to have taken place in this case, *directed against policyholders*, constitutes a 'boycott.'" *Ibid.* (emphasis added). In addition, the *Barry* Court concluded that Congress intended the term "boycott" in McCarran-Ferguson to be interpreted in light of the definition of that term under the Sherman Act. 438 U.S. at 541. A boycott under the Sherman Act may include a conditional concerted refusal to deal. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with the target, although not on the same terms as with the target's competitor, who was a part of the conspiracy).

Moreover, McCarran-Ferguson refers not only to boycotts, but also to "any * * * act of * * * coercion or intimidation." The ordinary meaning of "coercion" and "intimidation" is broad enough to encompass efforts to compel the target of the boycott to deal on specified terms. Indeed, those terms connote the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. By contrast, if the boycott exception were limited

to absolute refusals to deal, the McCarran-Ferguson Act would immunize virtually any form of coercive activity, as long as the companies engaging in coercive tactics did not seek to drive their competitors completely out of business by refusing to deal with them on any terms. We therefore agree with the court of appeals that petitioners' alleged conduct is within the boycott exception of McCarran-Ferguson.[10]

Petitioners emphasize (H. Pet. 18 n.18) "the uncertain state of the boycott exception." See also *id.* at 22 (asserting that courts and commentators are badly confused over whether boycotts are limited to absolute refusals to deal). We agree that *Barry* did not resolve all questions in this area, and that it is by no means always self-evident whether a particular set of facts constitutes a "boycott." See *Barry*, 438 U.S. at 543 ("boycotts are not a unitary phenomenon") (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)). But, while uncertainties remain in this area of law, *Barry* did establish some basic lines of demarcation. As the court of appeals recognized (Pet. App. A25), an agreement among insurers "on the terms on which insurance would be offered," without more, is not a McCarran-Ferguson boycott. Moreover, such an agreement does not become a non-immune boycott merely because it has some effect on other insurers. But an otherwise lawful agreement becomes a non-immune boycott if it has the purpose and effect of "pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and amounts to "regulation by private combinations [or] groups." *Barry*, 438 U.S. at 541, 549. As leading commentators have recognized, "'a [concerted] refusal to

[10] The legislative history provides further evidence that Congress intended to outlaw efforts of private groups to impose their preferences on their competitors, without limitation as to the particular form such private regulation takes. See, *e.g.*, 91 Cong. Rec. 1480, 1483, 1485 (1945). Indeed, the conduct at issue in *South-Eastern Underwriters*, which petitioners themselves regard as the paradigm of a boycott outlawed by McCarran-Ferguson (H. Pet. 22), involved a conditional refusal to deal. 322 U.S. at 535, 562.

deal except [on specified terms], without more' is exempt." but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members." P. Areeda & H. Hovenkamp, *Antitrust Law* 123 (Supp. 1991) (quoting *In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989)).[11]

c. Petitioners' alleged conduct may pass muster under the antitrust laws even if it is not immune under

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[11] Although petitioners assert that there is "pervasive disarray" in the lower courts over whether the boycott exception includes conditional refusals to deal, petitioners cite only two court of appeals decisions. Upon careful analysis, those decisions are not, we believe, in conflict. In *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 624 F.2d 476, 484 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981), the court stated that an allegation of boycott "does [not] necessarily fail because the concerted refusal to deal is conditional, rather than absolute." In *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir. 1989), the court held that an agreement to expel recalcitrant insurers from a rating bureau was a McCarran-Ferguson boycott. There was no "absolute refusal to deal" in the *Workers Compensation* case because insurers were permitted to retain their membership in the rating bureau as long as they adhered to fixed rates and other conditions set by the conspiring insurers. The ABA report quoted by the petitioners (H. Pet. 22) cites not one case to support its assertion that "[m]ost cases require a refusal to deal on any terms." American Bar Ass'n, *Report of the Commission to Improve the Liability Insurance System* 54 n.10 (1989).

The confusion that petitioners discern arises because "[l]ogically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price." *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), vacated, 440 U.S. 942 (1979). For example, the quoted statement in the ABA report occurs in a footnote to the statement that "cooperative efforts to standardize policy forms have been thought to be included well within the McCarran-Ferguson exemption." *ABA Report* at 54. Although petitioners are correct that the boycott exception does not include every agreement that could be viewed as a conditional refusal to deal, it does not follow that *no* conditional refusal to deal is a McCarran-Ferguson boycott. See *Proctor*, 561 F.2d at 276 n.23 (rejecting suggestion "that a total refusal to deal is necessary").

McCarran-Ferguson. "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979). In particular, the Court has noted that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. at 543, and has carefully distinguished the breadth of the boycott exception to McCarran-Ferguson from the question "whether the conduct in question * * * is *per se* unreasonable." *Id.* at 542. The Court has firmly insisted that the latter category of group boycotts "is not to be expanded indiscriminately" and has generally limited application of the per se rule to "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). See also *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-295 (1985) (detailing characteristics relevant to determining whether a concerted refusal to deal merits per se treatment). "[W]here the economic impact of certain practices is not immediately obvious," the Court has applied the rule of reason rather than a per se analysis. *Indiana Fed'n of Dentists*, 476 U.S. at 458-459 (citing *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)).

In this case, the complaints allege a concerted refusal to deal by reinsurers at the behest of a group of primary insurers. In our view, that is a claim within the exception to the McCarran-Ferguson Act for "boycott, coercion, or intimidation." There is thus no antitrust exemption for the alleged conduct, and the question whether petitioners' alleged conduct was lawful therefore must be analyzed under the antitrust laws. Although we express no view on the merits and have no firm basis for doing

so,[12] we note that further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the per se rule. For example, the decisions of this Court do not necessarily require per se condemnation if the challenged agreement called for the reinsurers to deal with all primary insurers on equal terms. The defendants would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Stationers*, 472 U.S. at 294. In that case, per se condemnation would be warranted only if it can be shown that the restriction's "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

3. The Hartford petitioners contend (H. Pet. 26-30) that their alleged activities are exempt from the federal antitrust laws under the state action doctrine, because several States approved the revised ISO standard forms. That contention does not merit review.

The court of appeals applied the correct legal standard: in order for private anticompetitive conduct to be exempt from the antitrust laws under the state action doctrine, the activity must take place pursuant to clearly articulated state policy, and must be actively supervised by the State. Pet. App. A29. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In addition, the court of appeals did not disagree with petitioners' contention that the States authorized and actively supervised the collective develop-

[12] In 1987, the Antitrust Division concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., Dep't of Justice, *The Crisis in Property-Casualty Insurance, in* Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). We are not aware of any reason to alter that conclusion. At the same time, our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

ment of insurance forms, and that consequently that activity is shielded by the state action doctrine. Pet. App. A29.

The court of appeals concluded, however, that the activity challenged by respondents was separate conduct not authorized or supervised by the States: namely, a reinsurance boycott to coerce dissenting primary insurers to accept more restrictive terms and conditions of insurance. Pet. App. A29. The court held that dismissal on state action grounds was not appropriate, because "state approval of one activity is not state approval of a related but distinct activity. * * * The alleged anticompetitive conduct in the present case * * * was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." *Id.* at A29-A30.

Petitioners do not challenge the principle that "state approval of one activity is not state approval of a related but distinct activity." Pet. App. A29. Instead, petitioners disagree with the court of appeals' determination that "there are truly two distinct activities at issue." H. Pet. 28. That fact-bound dispute does not warrant interlocutory review by this Court. In any event, the court of appeals' ruling on the state action issue appears to be correct. While state officials may have been aware that reinsurers favored the revised ISO forms (H. Pet. 29 n.22), petitioners do not assert that the state insurance officials knew about—let alone approved or actively supervised—the alleged reinsurance boycott that coerced dissenting primary insurers and the ISO to alter the forms. See *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2178-2179 (1992). Indeed, it is highly unlikely that state officials approved or supervised such activity, because the state insurance laws expressly prohibit coercion and boycotts. See H. Pet. 27 n.21.[13]

[13] Petitioners correctly note (H. Pet. 27) that the state action doctrine does not require a State specifically to authorize every action that private parties might take to effectuate a state policy. See *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48, 65-65 (1985). But that principle does not imply that state approval of revised insurance forms necessarily constitutes au-

There is no merit to petitioners' assertion (H. Pet. 26) that principles of federalism require the dismissal of respondents' action. Although state regulators may "have the tools they need to deal with any alleged misconduct" (H. Pet. 27 n.21), Congress has carved out an express exception to the McCarran-Ferguson immunity for boycotts. Consequently, the attorneys general of 19 States did not misconstrue principles of federalism by bringing these consolidated antitrust actions. Cf. *Ticor Title Ins. Co.*, 112 S. Ct. at 2178.[14]

4. a. Both the court of appeals and the district court held that respondents have antitrust standing to pursue their claims against all the petitioners. Pet. App. A19-A21, A65-A69. In No. 91-1131, petitioner Winterthur Reinsurance Corp. contends that respondents lack antitrust standing to pursue claims against reinsurers.[15]

Winterthur contends (W. Pet. 11-17) that the Court should grant review to determine whether a plaintiff must satisfy all the factors discussed in *Associated Gen-*

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thorization and active supervision of a boycott that is illegal under state law.

[14] There is no reason to vacate the judgment of the court of appeals and remand for further consideration in light of *Ticor*. The question in *Ticor* was whether the "active supervision" component of the state action doctrine requires that state officials actually determine whether the particular private anticompetitive activity at issue meets the State's regulatory criteria. In this case, the court of appeals did not question petitioners' contention that the States supervised and approved the standardized forms, but instead held that "state approval of one activity is not state approval of a related but distinct activity"—*i.e.*, the conspiracy to coerce reluctant competitors to accede to petitioners' proposed terms. H. Pet. App. 26a.

[15] As an initial matter, it is not clear that Winterthur preserved this argument before the court of appeals. Winterthur states (W. Pet. 2) that it is "a domestic reinsurance company." In addressing standing, the court of appeals noted (W. Pet. App. A19) that only the "foreign reinsurer defendants press[ed] their position on this appeal." Although Winterthur contends (W. Pet. 5 n.4) that it preserved the issue in a footnote in petitioners' brief in the court of appeals, the issue was not discussed in the text of the brief or included in the list of questions presented to the court of appeals.

eral Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983), in order to have antitrust standing, and if not, what weight is to be given to each separate factor in the standing analysis. But this case presents no opportunity to consider those general questions, because the court of appeals appears to have concluded that each of the *Associated General Contractors* factors favored standing. See W. Pet. App. 15a-17a.[16]

Winterthur objects (W. Pet. 18-24) to the court of appeals' application of the *Associated General Contractors* factors to the facts of this case. In particular, Winterthur contends that respondents' injuries were not sufficiently direct to confer antitrust standing because Winterthur is a reinsurer that deals only with other insurance companies, while respondents are consumers who deal only with primary insurers. W. Pet. 19-20. But Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents. See Pet. App. A134-A135, A137-A139; California Compl. Counts 1, 3, 4. Respondents are thus consumers in the very market that the alleged boycott was intended to disrupt; they suffered directly from a reduced range of services in the market in which the alleged restraint occurred. That injury was sufficiently direct to confer antitrust standing. See generally P.

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[16] The court stated (W. Pet. App. 16a) that "almost all of the *Associated General Contractors* factors point to the presence of standing." Although that statement, standing alone, suggests that the court found at least one factor that weighed against standing, a reading of the court's entire opinion suggests that the court was referring to its findings (W. Pet. App. 15a-16a) that "[i]n the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers," and "a danger of duplicative recovery." The court went on to conclude, however, that "the net balance as to damages is in favor of standing." *Id.* at 16a. And the court concluded that each of the other *Associated General Contractors* factors favors standing. W. Pet. App. 15a-17a.

Areeda & H. Hovenkamp, *Antitrust Law* 365-366, 392 (Supp. 1991).[17]

Respondents' position is similar to that of Carol McCready in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). In *McCready*, an insurer allegedly conspired with psychiatrists to deny insurance reimbursement to subscribers who received psychotherapy from psychologists. The direct targets of the boycott were the psychiatrists' competitors, the psychologists. But the Court held that consumers of insurance such as McCready had standing to sue under the antitrust laws. Just as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs. See 457 U.S. at 478-480.

Winterthur observes (W. Pet. 20-21) that if the reinsurers had engaged in a price-fixing conspiracy, the indirect purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would bar respondents' claims, and argues that the Court should extend the indirect purchaser rule to the victims of boycotts. *Illinois Brick*, however, concerned alleged horizontal price-fixing one step removed in the distribution chain from the consumer plaintiffs. In contrast, the antitrust violation alleged in this case is a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers. For antitrust standing purposes, it is therefore more closely analogous to resale price maintenance than to horizontal

[17] Winterthur argues (W. Pet. 20-21) that respondents have not alleged an antitrust injury. No other petitioner raises that argument, and it merits no further review. Respondents allege that Winterthur conspired with primary insurers to engage in a reinsurance boycott that had the purpose and effect of limiting the types of primary insurance that are available to respondents. Respondents have thus alleged an adverse effect on competition of the kind that the antitrust laws are intended to prevent. Winterthur also faults the court of appeals for considering defendants' intent to harm the plaintiffs. See W. Pet. 18-19. But the Court has recognized that intent is relevant to the standing inquiry. See *Associated General Contractors*, 459 U.S. at 537 & n.35.

price-fixing. As leading commentators have recognized, *Illinois Brick* has little application in such cases. "Although the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable * * * for the consumer's injury." P. Areeda & H. Hovenkamp, *supra*, ¶ 337.2e, at 404.

Moreover, the Court concluded in *McCready* that the problems of duplicative recovery and apportionment of damages at issue in *Illinois Brick* did not arise in the context of the *McCready* boycott. 457 U.S. at 474-475. This case, like *McCready*, does not appear to present a "risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Ibid.* Respondents' alleged injury consists of incurring costs not covered by insurance, or paying excessive amounts to obtain insurance coverage. Although the coerced primary insurers might also bring an antitrust suit, they presumably would allege a different type of injury, namely decreased sales of primary insurance as a result of the reinsurance boycott.

b. In No. 91-1146, a group of London reinsurers (the Unionamerica petitioners) contends that respondents lack antitrust standing to pursue certain claims directed solely against foreign reinsurers and unnamed co-conspirators. The Unionamerica petitioners argue (U. Pet. 10-15) that the court of appeals erred by treating antitrust injury as an element of the antitrust standing inquiry. As a result, petitioners contend (U. Pet. 10), "the Ninth Circuit has created a balancing test that permits a plaintiff showing antitrust injury to sue without establishing directness—and, conversely, a directly injured plaintiff to sue without establishing antitrust injury." But petitioners do not contend that respondents have failed to allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See U. Pet. 14 (petitioners' standing "motion did not raise the *Brunswick* antitrust injury

issue"). Moreover, the court of appeals expressly found that "[t]he injury alleged was direct." Pet. App. A20. Consequently, the court of appeals would not have reached a different result if it had considered antitrust injury separately from antitrust standing.[18]

The Unionamerica petitioners also contend (U. Pet. 15-21) that the disputed counts of the complaints do not allege a sufficiently direct antitrust injury to confer antitrust standing. According to petitioners, the disputed counts allege only an agreement among foreign reinsurers, and respondents did not buy anything from the foreign reinsurers. In fact, the disputed counts of the complaints allege an agreement not only among foreign reinsurers, but also including "unnamed co-conspirators." Pet. App. A141-A147. In addition, the complaints allege an intent to affect the availability of primary insurance to respondents. *Ibid.* Consequently, the Unionamerica petitioners are not in a materially better position than Winterthur to dispute plaintiffs' standing. Nor, in light of *McCready*, is there merit to their version of the argument that the indirect purchaser rule of *Illinois Brick* should be applied mechanically to customers in markets that are the focus of a boycott.

5. The petitioners in No. 91-1128 (the Merrett petitioners) trade in reinsurance on the Lloyds of London market. They contend that principles of comity require the dismissal of some of the counts against them. They do not contend that comity shields them from respondents' allegations that they conspired with primary insurers in the United States to deny reinsurance to other primary insurers who refused to alter the terms of CGL insurance. Pet. App. A135-A140, A186-A190, A195-A196. Instead, the Merrett petitioners contend that comity requires

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[18] Excluding antitrust injury from the antitrust standing inquiry plainly would not have altered the court's views as to the directness of alleged injury. Moreover, although the court accorded "tremendous significance" to the nature of the alleged injury, it also found that other *Associated General Contractors* factors also "point to the presence of standing against all of the defendants." Pet. App. A20, A21. See note 10, *supra*.

the dismissal of three counts in which they are alleged to have conspired with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those insurers adopted the proposed changes to their primary insurance policies. See California Compl. Counts 5, 6, and 8. Pet. App. A141-A147.

Both the court of appeals and the district court analyzed the comity issue under the balancing test of *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). The district court concluded that dismissal of the disputed counts was appropriate because "the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Pet. App. A81. The court of appeals reversed the district court because it concluded that "every other factor" except the conflict with British law and policy weighed in favor of jurisdiction. Pet. App. A32-A35.

Although petitioners contend (M. Pet. 12-18) that the courts of appeals have taken a variety of approaches in analyzing questions of comity, they do not contend that another court of appeals applying a different test would have reached a different result in this case. Indeed, petitioners do not object to the Ninth Circuit's *Timberlane* test, which they regard as "the most enlightened application of principles of international law to questions of jurisdiction under U.S. economic legislation." M. Pet. 3. Accordingly, this case does not present the question whether the *Timberlane* test, or some other test, states the appropriate standard for analyzing questions of comity.

Petitioners' principal complaint is that the Ninth Circuit has misapplied its own *Timberlane* test. Even if that were true, it would not ordinarily warrant review by this Court. But in any event, we think that the result the court of appeals reached under *Timberlane* is reasonable. The court recognized that application of the federal antitrust laws in this context is inconsistent with British law and policy, and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to

decline exercise of jurisdiction." Pet. App. A32.[19] But the court concluded that the conflict was outweighed by other factors: the substantial and foreseeable adverse effects on the United States, where the defendants do at least half their casualty underwriting; the alleged intent of the defendants to harm commerce in the United States; the fact that several of the petitioners are wholly owned subsidiaries of United States corporations; the fact that, regardless of the ruling on comity, the foreign firms will remain as defendants as to other counts of the complaints; and the ability of a United States court to grant effective relief by awarding damages payable from the defendants' assets in the United States or by issuing an injunction directed only at U.S. defendants. Pet. App. A33-A35. There is no reason for this Court to review that fact-specific analysis by the court of appeals at this juncture.

Finally, petitioners object (M. Pet. 22-24) to the court of appeals' comments concerning the relationship between *Timberlane* and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a.[20] The court of appeals stated:

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[19] In its brief as *amicus curiae* submitted in support of the Merrett petitioners, the United Kingdom states (U.K. Br. 9) that "the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime," and to hold British nationals liable for conduct that does not violate British law. But neither the United Kingdom nor the Merrett petitioners contend that British policy compelled or encouraged the alleged reinsurance boycott, or that petitioners could not have complied with both American and British law. Moreover, British courts have recognized that British subjects who violate American antitrust laws may be subject to the jurisdiction of American courts in certain circumstances. See *Midland Bank Plc.* v. *Laker Airways Ltd.*, [1986] 2 W.L.R. 707 (C.A.).

[20] The FTAIA provides in relevant part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless * * * such conduct has a direct, substantial, and reasonably foreseeable effect * * * on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. 6a.

> We do not believe a *Timberlane* analysis * * * can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a "direct, substantial, and reasonabl[y] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

M. Pet. App. A28. Petitioners do not claim that jurisdiction in this case is barred by the FTAIA. Nor do they assert that the court of appeals' comments concerning the FTAIA conflict with any decision of this Court or another court of appeals. In any event, the court's suggestion that the FTAIA may affect the *Timberlane* analysis was dicta, because the court concluded that the *Timberlane* analysis, quite apart from the FTAIA, required it to exercise jurisdiction. Pet. App. A32-A35.[21]

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[21] The court of appeals referred (H. Pet. App. 32a) to "the weight of the *findings* already made under the [FTAIA]" (emphasis added). But that statement referred only to the district court's findings that "the alleged agreement * * * concerned the provision of reinsurance within the United States," and that "the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." H. Pet. App. 27a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45542

No. 91-1146

Supreme Court, U.S.
FILED
AUG 14 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

—against—

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Petitioners in No. 91-1146 (the "Unionamerica petition") submit this response to the Solicitor General's brief on behalf of the United States as *amicus curiae* ("U.S. Br."). The Unionamerica petition seeks review of the Ninth Circuit's determination that plaintiffs have antitrust standing to challenge alleged restraints in the London reinsurance and retrocessional reinsurance markets.

The Solicitor General recognizes that "[t]his is a complex and important case." U.S. Br. 6. He recognizes error in parts of the Ninth Circuit's analysis, U.S. Br. 7, and he does not dispute that, contrary to the Ninth Circuit's holding, directness and antitrust injury are separate and necessary requirements of antitrust standing.[1] Nor does the Solicitor General deny that, as several Courts of Appeals have remarked, this Court's discussion of directness and antitrust injury in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), "has bred much confusion in the lower federal courts." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991). *See also Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1512 (1985). *See* Pet. 10-15; Reply Br. 2-3.[2]

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1 For a demonstration of the operation of antitrust injury and directness as independent requirements of antitrust standing, *compare Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (antitrust injury), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (antitrust injury), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S 477 (1977) (antitrust injury) *with Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990) (to be reported at 497 U.S. 199) (directness), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (directness).

2 The Unionamerica petition is cited as "Pet. _____"; the appendix to the Unionamerica petition, as "Pet. App. ____"; the Unionamerica petitioners' reply brief as "Reply Br. ____."

The Solicitor General nonetheless opposes review based on his observation that (1) petitioners do not contest the sufficiency of the allegations of antitrust injury, and (2) "the court of appeals expressly found that '[t]he injury alleged was direct.' " U.S. Br. 22 (citing Pet. App. A20). Thus, the Solicitor General argues, application of the test proposed in the Unionamerica petition would not alter the Ninth Circuit's result.

This basis of opposition, however, fails to come to terms with a central argument raised by the Unionamerica petition. The Ninth Circuit "found" directness of injury even while acknowledging that the consequences of which plaintiffs complain only "took effect through" at least one intervening market and intervening class of economic actors. Pet. App. A20. The court's "finding" thus removes all meaning from the directness requirement. The justifications the Solicitor General offers for the Ninth Circuit's conclusion as to directness neither support the holding nor diminish the mischief that the holding will cause.

First, while recognizing that the only named defendants in the counts subject to the Unionamerica petition are reinsurers, retrocessional reinsurers and brokers who operate in markets in which plaintiffs neither purchase nor compete, the Solicitor General points out, without further explanation, that those counts also refer to "unnamed co-conspirators." U.S. Br. 22 (citing Pet. App. A141-A147). However, an antitrust plaintiff must allege and eventually prove facts sufficient to establish its standing. *See, e.g., Cargill*, 479 U.S. at 110 & n.5. A plaintiff cannot meet that burden simply by including in the complaint a reference to unidentified co-conspirators whose role in the alleged conspiracy or position in particular markets is left unexplained. Such an allegation provides no means by which a court could satisfy itself that plaintiff could prove the requisite connection between its alleged injury and the conduct of the alleged wrongdoers. *Associated General Contractors*, 459 U.S. at 535.

Second, the Solicitor General suggests that plaintiffs have alleged a "direct injury" because "the complaints allege an intent to affect the availability of primary insurance to respondents." U.S. Br. 22 (citing Pet. App. A141-A147). Even were that true of the reinsurer-only conspiracies alleged in the counts subject to the Unionamerica petition, this Court has already made clear that "an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated General Contractors*, 459 U.S. at 537. The motive allegation simply is not "of controlling importance." *Id.* at 537 n.37.

The Solicitor General's principal arguments, therefore, fail entirely to address a fundamental, and dangerous, error in the Ninth Circuit's analysis: the failure to require allegations from which directness of injury can fairly be inferred. The London reinsurance claims assert a chain of causation that leads from alleged London-based reinsurance and retrocessional reinsurance conspiracies *through* other reinsurers and primary insurers and only then to plaintiff consumers. Pet. App. A128-A133, A141-A147, A20. This course of causation cannot be reconciled with this Court's definitions of directness. Moreover, the Ninth Circuit's error most plausibly results from, and is likely to be repeated because of, the use of a single balancing test for antitrust standing rather than the clearer, distinct tests for injury and directness implicit in this Court's decisions. *See* Pet. 10-15.

Finally, the Solicitor General argues that the Ninth Circuit's result can be validated by reference to this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), a case neither discussed nor cited by the Ninth Circuit. The Solicitor General's principal discussion of *McCready* and his efforts to distinguish *Illinois Brick* appear in his treatment of the petition of Winterthur Reinsurance Corp. (No. 91-1131). U.S. Br. 18-21. That petition addresses claims in which "Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents."

U.S. Br. 19 (emphasis in original) (citations omitted). Indeed, the very premise of the Solicitor General's discussion of *McCready* and *Illinois Brick* is the alleged participation of Winterthur in a conspiracy with entities that dealt directly with plaintiffs.[3] Because there is ~~no~~ dispute that the London reinsurance claims which are the subject of the Unionamerica petition do not name as conspirators any entities from which plaintiffs might have purchased or with whom they might have competed, the Solicitor General's treatment of *McCready* and *Illinois Brick* is not germane to the issues raised here.

Unlike the plaintiffs in the London reinsurance claims, the plaintiff in *McCready* participated in the directly restrained market. As the *McCready* Court described the conspiracy, the physicians and psychiatrists for whom Blue Shield served as agent sought to preserve for themselves the market for psychotherapeutic services in which Carol McCready was a consumer. 457 U.S. at 469 n.4, 478-80. By contrast, in the claims subject to this petition, plaintiffs allege that reinsurers conspired to set the terms on which retrocessional insurance and reinsurance would be made available to reinsurers and primary insurers. Plaintiffs do not allege that they purchase retrocessional insurance or reinsurance or otherwise participate in reinsurance markets.

Moreover, regardless of whether the plaintiff in *McCready* participated in the directly restrained market, she was "the direct victim of unlawful coercion." *Associated General Contractors*, 459 U.S. at 540 n.44. In order to achieve their goal of excluding psychologists, the conspirators acted directly on Ms.

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3 *See, e.g.*, U.S. Br. 20 (unlike *Illinois Brick*, "this case [involves] a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers"), 21 ("*Illinois Brick* has little application" where, " '[a]lthough the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable . . . for the consumer's injury' " (initial brackets added; remaining brackets and ellipsis in U.S. Br.) (citation omitted)).

McCready by denying her reimbursement of the cost of her psychotherapeutic treatment. *McCready*, 457 U.S. at 479. She was the fulcrum on which the alleged restraint directly turned. *See, e.g., Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983). Here, again in stark contrast, plaintiffs do not complain of any coercion directly imposed upon them by the reinsurers they seek to sue in the London reinsurance claims.[4]

In short, unlike the situation in *McCready*, the London reinsurers did not need to coerce, and are not alleged to have coerced, plaintiffs in order to achieve their unlawful goal. The reinsurers are alleged to have acted directly only on primary insurers and other reinsurers. Even if such actions eventually had an effect on plaintiffs as consumers in the primary insurance market, and were intended to have such an effect, that effect would be the same kind of indirect, legally insufficient effect alleged in *Utilicorp*. If the directness requirement is not satisfied even where, as in *Utilicorp*, customers of a regulated utility alleged that the utility had purchased price-fixed gas from the conspirators and passed the entire cost on to them, it cannot be satisfied by these plaintiffs' allegations. *See Utilicorp*, 110 S. Ct. at 2817; *see also Illinois Brick*, 431 U.S. at 745-46.

Indeed, the teaching of *Illinois Brick* and *Utilicorp* squarely applies to the reinsurer-only counts subject to this petition. Plaintiffs acknowledge that they sue only as consumers of primary insurance, that reinsurance is a product purchased only by

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4 The Solicitor General observes that "[j]ust as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs." U.S. Br. 20 (citing 457 U.S. at 478-80). But that analogy misses the point of the directness inquiry, which is not concerned with the nature of the injury alleged by the plaintiff (the subject of the antitrust injury inquiry), but with the chain of alleged events by which the injury was purportedly caused and the place of plaintiff and defendant, respectively, along that chain.

primary insurers, and that retrocessional reinsurance is purchased only by reinsurers. Thus, unlike *McCready*, the London reinsurance claims involve a vertical chain of distribution analogous to those underlying *Illinois Brick* and *Utilicorp*, and the counts subject to this petition allege conspiracies one step or even two steps removed from the consumer plaintiffs. Pet. 6-8. These counts therefore threaten precisely the difficulties that the directness requirement is intended to prevent—speculative theories of causation and damages, the burden of complex apportionment, and the risk of duplicative recovery. *Utilicorp*, 110 S. Ct. at 2813-15; *Associated General Contractors*, 459 U.S. at 542-45; *Illinois Brick*, 431 U.S. at 730-33, 745-46.[5]

Given the importance of private antitrust enforcement and, at the same time, the high cost of overdeterrence, this Court should provide clear, readily applicable standards by which the federal courts can determine when a potentially massive antitrust action may go forward. The Ninth Circuit's use of a balancing test and evisceration of the directness requirement will allow inefficient enforcers of the antitrust laws to pursue treble damages. The continuing confusion of directness and antitrust injury will yield inconsistent and unpredictable

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5 The allegedly restrained London reinsurance market is only one of several sources available to primary insurers and reinsurers seeking reinsurance or retrocassional insurance coverage, Pet. App. A116, and reinsurance and retrocassional insurance typically covers only a part of the portfolio of risks insured by the ceding carrier, Pet. App. A109, A161-A162. As a result, in order to prove damages, plaintiffs would have to reconstruct—and inevitably speculate about—innumerable decisions by other actors, including individual reinsurers, primary insurers, and insureds, concerning to what extent and on what terms they would obtain coverage. Unsurprisingly, the Ninth Circuit expressly acknowledged that the reinsurer-only claims would give rise to "a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery." Pet. App. A20. *See* Pet. 18-19.

results. This Court should grant this petition in order to provide the guidance that is needed to avoid these consequences.

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